Report on the free movement of workers in the Netherlands in 2010-2011

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REPORT
on the Free Movement of Workers in the Netherlands in 2010-2011

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Contents

Introduction

GENERAL ISSUES

Efforts to roll back free movement

In December 2009 a motion for the roll-back of free movement with the EU-12 was rejected in the Dutch Parliament with only the extreme right wing and the extreme left wing MPs voting in favour. The October 2010 coalition agreement of the current centre-right government, that depends on the support of the party of Geert Wilders (PVV), mentions a series of proposals to amend Directive 2004/38/EC; proposals that, if adopted, would apply to all EU nationals. The proposals are specified in a position paper of March 2011 and in a letter of the Minister of Social Affairs to the Second Chamber of April 2011. They include (a) a broader reading of the public order exception, (b) the expulsion of EU workers employed in another Member State for more than one year, but less than five years if the worker has insufficient income (i.e. a roll-back of the *Hoeckx* judgment of 1985), (c) mandatory integration measures to be paid by the EU national themselves, (d) family reunification with third-country national family members of EU migrants would be subject to the rules of Directive 2003/86/EC, those rules should be made more restrictive on eight points, previous irregular stay in the Member State should be a ground for refusal of family members of EU migrants, and (e) sufficient knowledge of the Dutch language should be a new, additional condition for public social assistance applied in conjunction with the existing rules that oblige beneficiaries of social assistance to take courses in order to improve their employability. Some of the measures explicitly focus on EU-12 nationals; others are drafted in a general fashion, but primarily with Polish and EU-2 nationals in mind. Mandatory integration measures, in our opinion, would hardly be compatible with the TFEU as they would seriously restrict free movement without a legal basis in that Treaty. Such measures and an additional Dutch language test would most probably also constitute direct or indirect discrimination on the basis of nationality. In 2010 and 2011 several District Courts held, with regard to Turkish nationals, that the obligation to participate in integration courses and to pass an integration exam is incompatible with the non-discrimination and stand-still clauses in the EEC-Turkey Association rules. Appeals against those decisions are pending before the *Centrale Raad van Beroep*, the highest social security court.

Polish (ex-)workers

In his 25 pages letter of 14 April 2011 to Parliament, the Minister of Social Affairs announced a range of measures on free movement of EU-12 workers aimed at fighting dubious private employment agencies and substandard payment and the improvement of accommodation of migrant workers. Other proposals, some of which are mentioned above, raise serious questions as to their compatibility with EU law. Moreover, the letter and other public statements by ministers and other politicians have contributed to the impression that the presence of nationals from EU-12, mainly from Poland, estimated between 100,000 and 200,000, creates serious problems with regard to the use of social benefits, social assistance

and facilities for homeless people. However, according to the data presented in that letter less than 700 Polish nationals received social assistance at the end of 2009. According to those data, the reliance on social assistance by Polish nationals is six times lower compared with the total Dutch population. There have been repeated reports about substandard payment and other employment conditions and substandard housing of EU-12 workers, especially Polish workers, in the media.

Transposition and application of Directive 2004/38/EC

The transposition of Article 3(1) remains a disputed subject in the Netherlands. The Judicial Division of the Council of State reversed the judgment of a first instance court that Article 3(1) of Directive 2004/38/EC has been implemented incorrectly by the Dutch legislator. The Council of State held that Dutch SIS-reports are only lifted upon request of another Member State once it has been established by that Member State that the third-country family member derives rights from Directive 2004/38/EC. The Dutch entry ban (declaration as undesirable alien) only requires reconsideration by the Netherlands when the Dutch spouse returns to the Netherlands from another Member State and his/her third-country national spouse accompanies or joins the Dutch national in the Netherlands.

The Aliens Circular states that as a rule an EU national working at least 40% of the normal working time can be considered a 'worker' (see B10/3.2.1 Aliens Circular). The statement itself is not incorrect. But the effect of the statement is that, in practice, EU citizens working less than 40% are often not considered to be workers and their free movement rights and/or the rights accorded to their family members are denied or disregarded on that ground or because of lack of sufficient income. This practice is clearly incompatible with Directive 2004/38/EC and with the Court of Justice's case law in *Geven*, *Megner* and *Genc*.

The issue of entry bans imposed on EU nationals without proper checks by the immigration authorities whether they are in conformity with the EU public order exception, as defined in Article 27 of Directive 2004/38/EC and the case law of the Court of Justice, still haunts the courts and the EU nationals concerned. The Judicial Division of the Council of State held that, as long as the declaration as undesirable alien is not withdrawn, legal residence as Community national is excluded on the basis of Article 67(3) Aliens Act 2000. A decision to declare an alien undesirable implies that further residence in the Netherlands is a crime under Article 197 of the Penal Code. EU nationals are regularly prosecuted for this crime. In 2010 the Supreme Court (*Hoge Raad*) ruled that criminal courts should always assess whether or not the declaration as undesirable alien complies with EU law, if this is disputed. This should even be done when the administrative decision is no longer open to legal review and the applicant has not appealed the decision before an administrative court.

Third-country family members

Most court cases decided in 2010 relate to unmarried partners from third-countries. The courts generally have accepted that the administrative rule that a durable relation exists if both partners have been registered for six months in the municipal population registration at the same address.

In June 2010 the Minister of Justice informed Parliament about the effectiveness of measures to control marriage migration in order to combat 'abuse and fraud' and the so-called Belgium or Europe route. In cases concerning an application for residence permission

with a partner (not with a spouse), the unmarried partner has to fill out a questionnaire concerning the relationship on the basis of which a decision is made concerning further investigations and simultaneous interviews with both partners. The IND reported that in 2009 13% of the requests for registration of third-country national family members of (returning) Dutch nationals were refused. The grounds for refusal were not disclosed. A study commissioned by the Ministry of Justice, published in 2009, revealed relatively few indications of fraud and abuse. It appeared that only a small minority of third-country national spouses/partners accompany a returning Dutch national; more than three quarters accompany a national of another Member State.

Registration of residence with the IND may be a lengthy process, sometimes taking several months. Before the IND has placed a sticker in the passport explicitly confirming that employment is allowed, access to the labour market is very difficult in practice. Employers are afraid to risk high administrative fines when they employ a third-country national who does not have a document certifying that he is entitled to work. First instance courts have held that the IND may not place a sticker in the passport that states that the third-country national family member is not entitled to work, if the family relationship with the EU migrant is not disputed, but the IND wants to conduct further investigations. Several District Courts have established that the sticker establishing the right to take up employment as provided for in Article 23 of Directive 2004/38/EC merely has declaratory effect. The right to labour market participation exists from the moment that it is apparent that the third-country national is a family member of an EU-citizen within the meaning of Directive 2004/38/EC.
The Council of State held that a third-country national who has been recognized as a family member of an EU-citizen by another Member State is still obliged to report his presence in the Netherlands in accordance with the Schengen rules, if he does not accompany or join the EU-citizen to/in the Netherlands.

The *Eind* judgment has been implemented in the new paragraph in the Aliens Circular on returning Dutch nationals who have used their free movement rights and their third-country family members.

Other problems

- The Minister of Social Affairs announced that in 2011 no more work permits would be granted to EU-2 nationals for seasonal labour. This restrictive change of policy and practice is hardly compatible with the standstill-clause in the relevant Annexes to the Accession Treaties. In 2010, a total of 2,000 work permits were granted for seasonal labour by workers from Rumania and 600 permits for workers from Bulgaria.
- Dutch administrative courts in cases on the recognition and termination of the residence rights of EU workers and other EU nationals tend to restrict the judicial review to a review of the situation at the time of the (last) administrative decision (*ex tunc*) rather than at the time of the hearing by the court (*ex nunc*) as required by the Court of Justice in *Orfanopoulos*. This limits the effectiveness of the judicial remedy and raises questions as to its compatibility with Article 47 of the EU Charter of Fundamental Rights. The tendency of the courts to disregard new arguments in judicial appeal proceedings that have not been raised during the administrative procedure is hardly compatible with Article 31 of Directive 2004/38/EC.
- The 2010 report by Jacques Ziller correctly points to two obstacles to access to public service job: (a) due to the vagueness of the clause in the Civil Service Act on so-called

functions of confidence, which are reserved for Dutch nationals, and as there is no comprehensive list of the relevant functions it is difficult to say whether the law and its application are compatible with Article 45(4) TFEU and (b) the absence of legal rules on the recognition of seniority acquired in other EU Member States may generate an obstacle to free movement for EU citizens, including returning Dutch nationals. Moreover, in recent years statutory provisions have been adopted that make sufficient knowledge of the Dutch language an explicit condition for employment in certain functions inside and outside the public service.

- Frontier workers experience problems with double health insurance, access to study grants and other social and fiscal benefits if the Dutch national lives in Belgium but works in the Netherlands. The residence clause in the Belgian system of educational vouchers results in an exclusion of Dutch (French, German and Luxembourg) frontier workers or their children.

Positive developments

- The government estimates that in 2010 approximately 9,000 EU nationals participated in integration courses and other integration measures offered by local authorities on a voluntary basis. This is an increase compared with previous years. However, the government has announced that it will no longer finance such integration measures. The migrants will have to pay the costs themselves. They may be offered a loan that may amount up to € 5.000 to pay for an integration course.
- National courts increasingly take into account both Directive 2004/38/EC, the case law of the Court of Justice on free movement of EU nationals and the 2009 Guidelines of the Commission on the application of that Directive. Several references to the *Ruiz Zambrano* judgment were made within weeks after that judgment was published.
- A number of judgments reveal that the Visa Code has reinforced procedural rights with regard to decisions on short-stay visa applications made by third-country national family members of EU migrants.
- The number of complaints about non-compliance with collective labour agreements increased considerably after the organization, established by private temporary employment agencies and trade unions, monitoring compliance with the agreements, employed Polish speaking staff to receive and deal with those complaints and provide information to Polish and other EU workers.

Chapter I: The Worker: Entry, Residence, Departure and Remedies

A. ENTRY

Texts in force

In the Netherlands Directive 2004/38/EC is mainly transposed by provisions of the Aliens Decree but the Aliens Act 2000, the Work and Social Assistance Act and the study grant legislation were amended as well. Chapters A2 and B10 of the Aliens Circular 2000 contain the policy guidelines for the implementation of Directive 2004/38 as embedded in the amended Aliens Decree.

On 29 January 2009 Chapters A2 and B10 of the Aliens Circular 2000 were amended to clarify more precisely the entry formalities for family members of EU/EEA and Swiss nationals. At the same time the policy concerning the administrative formalities for unmarried partners of EU citizens were clarified (*Staatscourant* 29 January 2009, No. 1380, entered into force 31 January 2009). In particular a 'durable relationship, duly attested', as mentioned in Article 3.2(b) and Article 8.7(4) Aliens Decree 2000, is specified in the new paragraph A2/6.2.2.2: a relationship is considered durable in case of a common household for at least six months or a common child. A further amendment concerns paragraph B10/5.3.2.1 that has been brought in line with the Court of Justice's judgment in *Eind*: on return to the Netherlands a Dutch national is still entitled to his free movement's right, even if he is no longer economically active.

On 23 September 2009 the Draft Act Modern Migration Policy was presented to Parliament (Tweede Kamer 2008-2009, 32 052 Nos. 1-3). This Bill introduces faster admission procedures for regular migrants in the Netherlands. It does not apply to asylum seekers or to EU-citizens exercising free movement rights. On 16 July 2010 the Bill was published in the Official Journal (*Staatsblad* 2010, 290) with a proposed date of entry into force: 1 January 2011 (the entry into force was postponed for an indefinite period due to ICT problems on a later date, Tweede Kamer 2010-2011, 30 573, No. 66).

On 30 July 2010 the Modern Migration Policy Decree was published (*Staatsblad* 2010, 307), which amends the Aliens Decree 2000 in order to implement the Modern Migration Policy Act (entry into force: postponed for an indefinite period) and the Blue Card or Highly Qualified Workers Directive 2009/50/EC (to be implemented by 19 June 2011) and introduces stricter public order criteria. The latter part of the decree entered into force on 31 July 2010. To implement the new public order policies the paragraphs A5, B1, C4 and C8 of the Aliens Circular were amended (WBV 2010/11A, *Staatscourant* 30 July 2010, No. 11415).

Judicial practice

District Court Utrecht, 10 April 2010, AWB 09/25347 [LJN: BM1997] concerned an Albanian national who requested residence with his Romanian partner. According to the State Secretary of Justice proof of a "durable relationship, duly attested" was lacking. Both are not registered partners. The presented civil registration proves the existence of a relationship, but not its durability, while the condition of a common household for at least six months is not fulfilled. The District Court agreed. Article 8.7(4) Aliens Decree 2000 and the relevant paragraphs of the Aliens Circular 2000 are a correct transposition and implementation of the

Directive. See however, District Court, Arnhem 19 August 2010, AWB 09/41938 [LJN: BN6033], *Jurisprudentie Vreemdelingenrecht* 2010/415. This court not so sure that Article 3(2) Directive 2004/38/EC has been implemented correctly. A 'durable relationship' should not be interpreted restrictively. Contrary to the relevant paragraphs of the Aliens Circular 2000 the durability of the relationship can be proved with any appropriate means. Other indications concerning the durability are taken into account by District Court Amsterdam, 13 July 2010, AWB 10/20507.

In District Court Amsterdam, 30 March 2010, AWB 10/172, 10/4154, [LJN: BM1224], *Jurisprudentie Vreemdelingenrecht* 2010/233 (a Polish and a Pakistani national) the State Secretary of Justice added an additional condition; the applicant should not only prove a common household and, therefore, a stable relationship, but also an "exclusive" one. The court granted the appeal as this requirement is not included in Article 8.7(4) Aliens Decree 2000 or the Aliens Circular 2000.

Notwithstanding evidence of six months common household, a Brazilian national was denied a residence permit as his partner had dual nationality, Dutch and Portuguese. In the review proceedings (15 January 2010 (No. 271.930.4051)), the State Secretary of Justice decided that the partner, notwithstanding his dual nationality, should be treated as an EU-citizen who benefits from free movement rights. Therefore EU-law applies. The decision is remarkable as the Dutch/Portuguese partner has never resided in a Member State other than the Netherlands. Dual nationality also played a role in District Court, Amsterdam 8 October 2010, AWB 10/8642, 10/8644, 10/2592. Based on the questions in *McCarthy* (CJ EU 5 May 2011, C-434/09, *Jurisprudentie Vreemdelingenrecht* 2011/243, with annotation P Boeles), the District Court decided to suspend the case. In the light of *McCarthy* it is doubtful whether the Dutch/Portuguese partner could rely on Directive 2004/38/EC as he had always resided in the Netherlands.

A Turkish national cannot derive any right from EU-law, as long as he has not submitted the required civil registration document which proves his durable relationship with a national of a Member State. The same document is required from Dutch nationals and legally residing migrants who apply for family reunification. Therefore, the requirement of paragraph A2/6.2.2.2 Aliens Circular 2000 does not contravene Article 12 ECHR. See District Court Rotterdam 4 March 2010, AWB 09/2946 [LJN: BL7188].

Administrative practice

On 21 December 2010 the Minister for Immigration and Asylum informed Parliament about the immigration of prostitutes from Eastern Europe (Tweede Kamer 2009-2010, 28 638, No. 49). To combat this type of immigration a distinction should be made between EU/EEA and other countries. EU citizens (with the exception of Bulgarian and Romanian nationals) enjoy free movement of workers. Until free movement rights are extended to Bulgarian and Romanian workers, no labour permits will be issued for work as a prostitute. They can, however, work as a service provider or as a self employed person under the general condition of registration with the Chamber of Commerce and the special conditions for prostitutes of the Tax Authority. For countries outside the EU/EEA no labour permits will be issued as a substantial Dutch interest is lacking.

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B. RESIDENCE

Texts in force

Union citizens and their family members who hold a valid identity card or passport enjoy the right of residence for a period of up to three months in another Member State without any formalities (Article 6 of the Directive). This rights is implemented in Article 8.8(1) of the Aliens Decree for (a) holders of a valid identity card or valid passport and for (b) a person who can prove his identity and nationally unequivocally with other means (see also the Aliens Circular B10/2.4). The optional clause of Article 5(5), concerning the obligation to report to the authorities within a reasonable time, has not been transposed in the Aliens Decree for residence for a period for up to three months. According to B10/2.3 of the Aliens Circular Union citizens are exempted from the obligation to report. There is an obligation to report to the authorities for EU-citizens who intend to reside for if residence exceeding three months.

Article 7 of the Directive concerns the right of residence for more than three months. Article 7(1) distinguishes between workers and self-employed persons, inactive persons, students and family members. The right of residence for more than three months is transposed by Article 8.12 of the Aliens Decree in a rather complicated way due to the much differentiated categorisation of family members. Article 8.13 concerns the right of residence for more than three months of third-country family members. In the Aliens Circular the right of residence for more than three months is elaborated in B10/2.5.2 and 5. The obligation to report is embedded in Article 8.12(4) of the Aliens Decree. After the period of residence for up to three months (Article 8.11) the migrant has to register with the alien's administration (the Immigration and Naturalisation Service). This obligation is sanctioned in Article 108(5) of the Aliens Act 2000, with a maximum of imprisonment for a period of one month or a fine of the second category. After registration the Immigration and Naturalisation Service issues a registration certificate (Article 8.12 (6) of the Aliens Decree). This is a sticker that is placed in passports or attached to other identity papers. Once registered, an EU citizen is, in principle, entitled to stay in the Netherlands for as long as (s)he wishes.

Article 8.12(1) of the Aliens Decree provides for the same treatment of job seekers as accorded to workers and self-employed persons. According to Article 8.12(1) a job seeker is entitled to a right of residence for more than three months when he is able to prove that he is still looking for a job and has a real opportunity to get a job (see also Aliens Circular B10/3.1). Like all EU-citizens, a job seeker has to register with the Immigration and Naturalization service on expiry of the three months residence period. The same restrictions concerning public policy, public security or public health apply.

Union citizens who have resided legally for a continuous period of five years in the host-Member State enjoy an unconditional right of permanent residence in that Member State (Article 16 Directive). Situations which do not affect the continuity of residence are enumerated in Article 16(3). The same enumeration is found in Article 8.17(2) of the Aliens Decree.

When certain conditions as to the length of residence and employment are fulfilled, Article 17 of the Directive grants, by way of derogation from Article 16, a right of permanent residence is accorded to workers or self-employed persons, persons who are entitled to an old age pension (including early retirement), persons who stop working as a result of permanent incapacity, or who are cross-border workers even if they do not satisfy the requirement of a continuous period of five years residence. The conditions in Article 17 are more or less literally transposed by Article 8.17(3)-(5) of the Aliens Decree. The specific rules for family members in Article 17(3) and (4) of the Directive are found in Article 8.17(6) and (7) of the Aliens Decree.

Upon application Member States shall issue Union citizens, who are entitled to permanent residence and after verification of the duration of residence, a document certifying permanent residence as soon as possible (Article 19 Directive). A new document "permanent residence for EU citizens" was introduced on 1 May 2006 (Article 8.19 Aliens Decree). It is to be issued automatically to Union citizens who have resided for more than five years in the Netherlands when the validity of the old document expires and costs € 43 (since 1 January 2011, *Staatscourant* 2010, No. 20991). Member States shall issue a permanent residence card to third-country family members entitled to permanent residence. This card is automatically renewable every 10 years (Article 20 Directive). This is implemented in Article 8.20 Aliens Decree. Permanent residence is elaborated on in B10/2.5.3 of the Aliens Circular.

On 21 June 2009 an amended *Regeling verstrekkingen bepaalde categorieën vreemdelingen* entered into force (*Staatscourant* 2009, No. 111). According to the amended Regulation inter alia EU-citizens who are the victim of human trafficking or honour related or domestic violence are entitled to social security assistance during the initial period of up to three months.

In July 2009 the Commission published Guidelines for the application of the free movement Directive 2004/38/EC (COM(2009) 313 final). Based on the Guidelines the wording of paragraph B/10 of the Aliens Circular 2000 was amended slightly and clarified, see WBV 2010/20, *Staatscourant* 2010, No. 20701 (22 December 2010), which entered into force on 1 January 2011.

Judicial practice

District Court Amsterdam, 7 January 2010, AWB 08/34644 [LJN: BK9765], *Jurisprudentie Vreemdelingenrecht* 2010/113, with annotation P Boeles concerns a Liberian national (the applicant) and his Dutch partner. Could they successfully rely on European law due to previous residence and work of the Dutch partner in the UK and Belgium? The Court decided negatively. Residence and work of the partner in the UK from 1986 till 1991 are irrelevant for the applicability of European law as there is no link between her activities in the UK and her current activities. Furthermore, at the time when free movement rights were exercised, she was married to another person. Her stay in Belgium in early 2008 is also irrelevant, as there is no link between her residence in Belgium and the presence of the applicant in the Netherlands nor did he accompany her on return from Belgium to the Netherlands. Therefore, the case differs from *Surinder Singh* and *Eind* and should be considered as an internal situation. Finally, the Dutch partner did not prove any substantive border services as men-

tioned in paragraph 37 of the *Carpenter* judgement. On 7 September 2010, the Judicial Division of the Council of State confirmed the decision of the District Court, 201000977 [LJN:BN6685], *Jurisprudentie Vreemdelingenrecht* 2010/437, with annotation H Oosterom-Staples.

A third-country national family member of a Dutch national may derive a right of residence based on EU-law when both have resided together in another Member State preceding their establishment in the Netherlands. The *Metock* judgment has not change this requirement. See District Court Arnhem, 4 December 2009, AWB 09/17913 [LJN: BL8962], *Jurisprudentie Vreemdelingenrecht* 2010/202. In this case neither could prove the existence of a stable relationship at the time of the Dutch partner's residence in Spain. On 7 September 2010 the Judicial Division of the Council of State confirmed the decision of the District Court, 201000085 [LJN:BN6683], *Jurisprudentie Vreemdelingenrecht* 2010/438 with annotation H Oosterom-Staples.

A US national claiming an EU-right of residence argued that his Dutch spouse has exercised her free movement rights. They have lived in the Netherlands between 1973 and 1983, in Sweden from 1983 until 1997 and since 1997 in the USA. They returned to the Netherlands in 2007. According to District Court 's-Hertogenbosch, 8 July 2010, AWB 08/31499 [LJN: BN2971] EU-law is not applicable as both have resided outside the EU for a long time.

Administrative practice

On 30 June 2010, the Minister of Justice informed Parliament about the effectiveness of the measures to enhance the integration and emancipation of family migrants and the measures to control marriage migration in order to combat "abuse and fraud" (Tweede Kamer 2009-2010, 32 175, No. 10). When an application for residence as a partner is lodged, the partners have to fill out a questionnaire concerning the relationship. Depending on the answers to the questions a decision is taken concerning further investigations and/or (simultaneous) interviews.

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C. DEPARTURE AND DETENTION

Texts in force

The right of permanent residence only is lost through an absence from the host-Member State for a period exceeding two consecutive years (Article 16(4) of the Directive). This provision is transposed in Article 8.18 of the Aliens Decree which also mentions serious reasons of public order and public security as another ground for withdrawal (see Article 28(2) of the Directive).

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in cases of abuse or fraud, such as marriages of convenience (Article 35). The wording in Article 8.25 Aliens Decree is more general; i.e. "the Minister may withdraw the right of residence if the alien has submitted wrongful information or has withheld information which should have had as a consequence the refusal of entry or residence". This provision suggests that withdrawal of the right of residence is possible in cases that actually are not covered by Article 35 of the Directive.

Chapter VI of the Directive contains the restrictions on the right of entry and residence on grounds of public policy, public security or public health. In the Aliens Decree public health is mentioned in Articles 8.8(1), sub b (entry) and 8.23. For public policy and public security the relevant Articles are: 8.8(1), sub a and b (entry), 8.22 and 8.24. Public health may only be applied to restrict the right of entry during a three-month period from the date of arrival. This is also the case in the Aliens Decree. The relevant diseases are diseases defined by relevant instruments of the World Health Organisation (WHO) and other diseases if they are the subject of protective measures which apply to nationals of the host-Member State. Article 8.23 of the Aliens Decree refers to the lists of the WHO and other infectious diseases or contagious parasitic diseases which are subject of protective measures which apply to Dutch citizens. The Explanatory Memorandum mentions plague, cholera and yellow fever and recent diseases as SARS (Staatsblad 2006, No. 215, p. 32, 33 and 46).

Article 27 of the Directive codifies the case law of the Court of Justice concerning public policy and public security. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Article 8.22(1) of the Aliens Decree contains the same definition. Article 28(1) of the Directive that obliges Member Sates to take a number of personal considerations into account has not, though the Council of State advised otherwise, been transposed in Article 8.22 of the Aliens Decree. The general (but less specified) clause concerning the weighing of interests of Article 3:4 of the General Administrative law Act applies. According to Article 28(2) of the Directive, as transposed by Article 8.18, sub b of the Aliens Decree, the host-Member State may not take an expulsion decision against Union citizens or their family members, who have acquired the right of permanent residence, except on serious grounds of public policy or public security. After 10 years of legal residence or in the case of minority only imperative grounds of public security may justify an expulsion order, see Article 28(3) of the Directive as transposed by Article 8.22(3) of the Aliens Decree.

The notification provision of Article 30 of the Directive has not been transposed as such in the Aliens Decree. Article 8.8(2) of the Aliens Decree stipulates in general wording that a refusal of entry shall be notified in writing. The procedural safeguards of Article 31(2) and (4) of the Directive are embedded in Article 8.24(1) and (2) of the Aliens Decree. The maximum period of three years for the submission of an application for the lifting of the public policy or public security exclusion order in Article 32 of the Directive is transposed in the Aliens Decree in the possibility of automatic review of the expulsion after two years; see Article 8.22(6).

The departure of EU citizens is elaborated in A4/3 of the Aliens Circular and the restrictions on the right of entry and residence on grounds of public policy, public security or public health in B10/7.1.1.

Judicial practice

In Judicial Division of the Council of State, 10 February 2010, 200909095/1/V3 [LJN: BL3886] an alien could not prove unequivocally his Romanian citizenship and was detained. After the Romanian authorities confirmed his citizenship he was released. According to the Judicial Division of the Council of State the lawfulness of the detention measure was only terminated after the declaration of the Romanian authorities. In first instance the court decided differently and considered the detention unlawful from the start.

In Judicial Division of the Council of State, 16 February 2010, 200904699/1/V1 [LJN: BL4540], *Jurisprudentie Vreemdelingenrecht* 2010/136, the Judicial Division decided that - although Article 5 of the Benelux Treaty and Article 27 of the Directive are not identical - Article 5 of the Benelux Treaty has no independent meaning anymore in the light of Article 350 TFEU and the Court of Justice's case law (*Orfanopoulos and Oliveri*, *Jurisprudentie Vreemdelingenrecht* 2004/227). No stricter criteria for a declaration as undesirable alien are required according to the Benelux Treaty.

A third-country national, declared undesirable and detained, wanted to join his Dutch wife who planned to move to Belgium using her free movement rights. District Court Dordrecht, 19 March 2010, AWB 10/6992, *Jurisprudentie Vreemdelingenrecht* 2010/174 ordered the release as, according to Article 59(3) Aliens Act 2000, detention should be terminated when the applicant expresses the wish to leave the country and has the opportunity to do so. The declaration as undesirable alien in the Netherlands does not, as such, amount to an actual threat to public policy in Belgium. Judicial Division of the Council of State, 12 May 2010, 201002955/1/v3 [LJN: BM5538], *Jurisprudentie Vreemdelingenrecht* 2010/252 annulled the decision of the District Court as it found the statement expressing the desire to leave the country not substantive enough.

District Court Amsterdam, 3 March 2010, AWB 08/44901 [LJN: BL9814], *Jurisprudentie Vreemdelingenrecht* 2010/203 concerned a Moroccan national who was declared undesirable in 1997. On 10 December 2007 he requested the withdrawal of the declaration and the registration in (N)SIS, as he wanted to join his Dutch spouse in Belgium. According to the Secretary of State the applicant could not rely on EU-law in the Netherlands, but only in Belgium. An assessment based on the public policy criteria in the Directive should take place when the applicant has requested residence in Belgium and Belgium is considering granting residence permission and in that context requests the Netherlands to withdraw the SIS-report. The District Court disagreed. The Netherlands has its own responsibility to assess the declaration as an undesirable alien and the SIS report in the light op EU-law. Judicial Division of the Council of State, 9 November 2010, 201003131/1/V1, *Jurisprudentie Vreemdelingenrecht* 2011/9, with annotation H Oosterom-Staples, annulled the decision of the District Court. The declaration as undesirable alien should only be reconsidered by the Netherlands when the Dutch spouse intends to return to the Netherlands after exercising free movement rights in Belgium and the third-country national family member wants to accompany/join his spouse.

According District Court 's-Hertogenbosch, 28 March 2010, AWB 09/791 [LJN: BM1549] the State Secretary of Justice has sufficiently motivated an expulsion decision as the applicant's conduct represents a genuine, present and sufficiently serious threat (conviction for rape and forcible theft and a criminal record in Poland).

As long as the declaration as undesirable alien is not withdrawn, legal residence as a Community national is excluded (Article 67(3) Aliens Act 2000), see: Judicial Division of

the Council of State, 23 March 2010, 201001428/1/V3 [LJN:BL9331], *Jurisprudentie Vreemdelingenrecht* 2010/185.

In Judicial Division of the Council of State, 3 May 2010, 201002977/1/V3 [LJN: BM5541, *Jurisprudentie Vreemdelingenrecht* 2010/247 a Turkish national wanted to be released from detention claiming that he derived a right of residence from European law. The Judicial Division disagreed. Legal residence not only requires proof of a durable relation, but also the possession of a valid passport by the third-country national family member. As long as a passport is lacking the detention can be continued. The possibility to submit a valid travel document within a reasonable time does not preclude the continuation of the detention.

Judicial Division of the Council of State, 6 May 2010, 201001849/1/V3 [LJN: BM5535], *Jurisprudentie Vreemdelingenrecht* 2010/249 concerns a Brazilian national in detention. He applies to be released as he wants to leave the country in order to join his French spouse in Paris. A marriage certificate is not sufficient proof that he will be admitted to France. Appeal denied.

In Judicial Division of the Council of State, 26 May 2010, 2009087321/V3 [LJN: BM6096], *Jurisprudentie Vreemdelingenrecht* 2010/276 a Moroccan national (married to a Belgian national) in the Netherlands for four weeks (with valid passport and residence permit issued by the Belgian authorities) was detained as he had not reported himself to the authorities. He could not claim entry and residence based on the Directive (and therefore be exempted from the obligation to report) as he had not entered the Netherlands together with his Belgium spouse as required by Article 3(1) of the Directive.

An Algerian national is declared undesirable in 1992. As he is married to a Romanian national he claims that the declaration as undesirable alien is null and void, because it should have been assessed in the light of the EU-concept of public order in 2007. The District Court disagrees. The original decision is still valid. The applicant has to apply for review or withdrawal of the decision. As long as the decision stands, legal residence based on EU-law is excluded. See District Court Amsterdam, 29 May 2010, AWB 10/16577 [LJN: BM7585], with reference to Judicial Division of the Council of State, 23 March 2010, *Jurisprudentie Vreemdelingenrecht* 2010/185 (see above).

A decision to declare a person undesirable implicates that continued residence in the Netherlands is an offence according to Article 197 of the Penal Code. Even EU citizens are regularly prosecuted under Article 197 of the Penal Code. According to the Supreme Court, 13 July 2010, 08/05143[LJN: BL2854] the criminal courts should always assess whether or not the declaration as undesirable alien complies with EU-law, if this is disputed. This is also the case if the decision already has legal standing, even if the applicant has abstained from the possibility to appeal the decision before an administrative court. In his Conclusion the Advocate General suggested a request for a preliminary ruling on the following questions.

- is prosecution of an EU-citizen based on Article 197 Penal Code a measure as mentioned in Article 3(1) read in conjunction with Article 2 of Directive 64/221?
- should the present threat still exist at the moment the public prosecutor decides to start a prosecution?

The Supreme Court did not follow the suggestion of the Advocate General.

A Nigerian national married a Dutch national in Spain in 2006 and was entitled to an EU-right of residence in that Member State until 2012. He is declared undesirable. Should this decision be based on the public policy criteria of the Directive? Not according to the Minister of Justice, as the marriage actually ended in March 2007. In an injunction procedure

the District Court Middelburg (12 July 2010, AWB 10/15305 [LJN: BN3110]) disagreed. The Minister of Justice should haven taken into account the applicant's EU-right of residence in Spain.

Judicial Division of the Council of State, 6 December 2010, 200907934/1/V1 [LJN: BO7026], *Jurisprudentie Vreemdelingenrecht* 2011/49 concerns an applicant who moved on the day of his crime from Germany to the Netherlands. As his spouse had not moved to another Member State than the Member State of her nationality, Article 3(1) of the Directive is not applicable. The alien had not accompanied his spouse to another Member State, nor joined his spouse in another Member State on the day of his crime. Therefore, contrary to findings of the District Court, there was no obligation for the State Secretary of Justice to assess whether the applicant's conduct represents a genuine, present and sufficiently serious treat. With regard to the applicability of Article 3(1) of the Directive the decision is in line with the above mentioned decision of 7 September 2010 of the Judicial Division of the Council of State (201000977 [LJN:BN6685], *Jurisprudentie Vreemdelingenrecht* 2010/437, with annotation H Oosterom-Staples).

Administrative practice

In the 2008-2009 and 2009-2010 national reports we concluded that in many instances the administrative decisions concerning undesirability are not in conformity with the case law of the Court of Justice, particularly not with the requirement that the personal conduct of the person concerned should be taken into account. A decision to declare a person undesirable implicates that continued residence in the Netherlands is an offence according to Article 197 of the Penal Code. Even EU-citizens are regularly prosecuted under Article 197 of the Penal Code. The sentences of the Criminal Court Amsterdam, 29 November 2007, 13/421598-07, 13/421609-07, *Jurisprudentie Vreemdelingenrecht* 2008/93 - mentioned in the 2007 national report - and of the Criminal Court Maastricht, 11 April 2008, 03/700720-07 and 03/700035-08 [LJN: BC9282] - see the 2008-2009 national report - and the above mentioned judgment of the Supreme Court of 13 July 2010 reveal the existence of an internal instruction to the public prosecutors to abstain from prosecution according to Article 197 of the Penal Code in cases in which the administrative decision lacks a clear motivation why the personal conduct of the accused constitutes a present threat. When requested to elaborate on the consequences of this instruction by a lawyer, the State Secretary of Justice stated, on 21 July 2009, that, when the police arrests EU-citizens based on Article 197 of the Penal Code, they immediately contact the Immigration and Naturalization Service (IND). The IND then reconsiders the decision on undesirability according the EU criteria. If the decision proves not to be in conformity with European law, the police inform the EU-citizens that (s)he may request the IND to annul the decision on undesirability.

In a letter of 13 August 2007 the State Secretary of Justice informed Parliament about the efficiency of the public order policies (Tweede Kamer 2006-2007, 19 637, No. 1168). The stricter criteria of the 'sliding scale', as introduced in 2005, were to be continued until the evaluation in the fall of 2008. Several measures designed to enhance the efficiency of the public order policy were proposed, inter alia a pilot in the police regions of The Hague and Rotterdam to gain a better insight in the notion of a 'present threat'. The aim is to declare more Union citizens, who are involved in criminal violence, as undesirable aliens and to expel them. On 17 December 2008 the State Secretary of Justice informed Parliament about the delays in the evaluation research (Tweede Kamer 2008-2009, 19 637, No. 1244). In May 2009 the State Secretary of Justice had to postpone the evaluation again (Tweede Kamer

2008-2009, 19 637, No. 1286). Finally, the report was published on 13 August 2009: WODC-rapport *Toepassing en aanscherping van de glijdende schaal*. For the withdrawal of residence permission the "sliding scale" is only of limited importance. In the 797 cases in which the sliding scale applied in principle, a residence permit was only withdrawn in 134 cases (28%) by applying the sliding scale and in 351 cases (72%) on other grounds. The sliding scale is mainly effective in cases where residence has not exceeded a period of five years. Stricter criteria will only have a limited added value, as the group of convicted migrants with short residence is rather small.

On 30 October 2009 the Minister and the State Secretary of Justice informed Parliament about their conclusions (Tweede Kamer 2009-2010, 19 637, No. 1306). First of all, stricter criteria for serious crimes are to be introduced. Secondly, the possibility of accumulation of convictions and measures will be extended to migrants with residence permits for an indefinite period. Thirdly, even stricter criteria for habitual offenders (*veelplegers*) are to be introduced and, fourthly, there will be fewer exceptions for minors. Finally, the Immigration and Naturalisation Service (IND) will apply the amended sliding scale more frequently than in the past. The Minister and State Secretary of Justice recognize that regarding EU-citizens only Directive 2004/38/EC applies.

In addition to the stricter criteria of the "sliding scale", introduced on 30 October 2009 (Tweede Kamer 2009-2010, 19 637, No. 1306), the State Secretary of Justice informed Parliament on 26 January 2010 about her proposal to extend the time frame in migration procedures to confront applicants with their criminal record (Tweede Kamer 2009-2010, 19 637, No. 1319). The proposals were discussed in the Second Chamber of Parliament on 27 January 2010 (Tweede Kamer 2009-2010, 19 367, No. 1330). On 17 February 2010 a parliamentary motion to withdraw residence after three convictions in the first two year was accepted (Tweede Kamer 2009-2010, 19 367, 1324 and Handelingen, 56). The new proposals entered into force on 31 July 2010 (amendments of Articles 3.86, 3.95(3) and 6.6 of the Aliens Decree 2000, Staatsblad 2010, 307).

In a letter of 7 October 2010 the Minister of Justice informed Parliament about the results of a pilot to intensify the use of the declaration as an undesirable alien (Tweede Kamer 2010-2011, 19637, No. 1362). More intensified use of this instrument has seen the number of aliens actually leaving the country increase.

On 29 October 2010 the Minister for Immigration and Asylum and State Secretary of Security and Justice reacted to the report (see literature below) on aliens detention of September 2010 (Tweede Kamer 2010-2011, 19637, No. 1364). They confirmed the policy to underline the administrative law character of aliens detention and informed parliament that the programme of the daily activities will be extended with substantial activities for at least four hours a week and the detainees will be better informed about their rights. From 1 January 2011 the supervising staff will be placed under the direct responsibility of the director of the institution.

Literature

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D. REMEDIES

Judicial practice

District Court Middelburg, 18 March 2010 AWB 09/24930 [LJN: BL8881] concerned a combined appeal of a Belgian national against the declaration as undesirable alien and the withdrawal of his right of residence. As the applicant had failed to submit grievances against the withdrawal of his right of residence in the preceding administrative review procedure his appeal against the withdrawal is considered inadmissible. According to the rapporteurs it is doubtful whether this conditional provision of Dutch procedural administrative law is in line with Article 31 (procedural safeguards) of Directive 2004/38/EC.

District Court The Hague, 29 November 2010, AWB 09/36450, 09/36451 [LJN: BP1126], concerns the negative decision in review of the State Secretary of Justice of 16 June 2009 in which residence was denied to a Cape Verde partner of a Portuguese national as they could not prove a common household. The argument put forward during the court proceedings that they have lived together since 17 July 2009 was set aside due to the ex tunc character of the judicial review proceedings.

In District Court The Hague, 5 November 2010, AWB 09/35659, [LJN: BO7515], *Jurisprudentie Vreemdelingenrecht* 2011/60, a family member of an EU citizen received a residence sticker 'not valid for employment'. During the appeal procedure a sticker 'valid for employment' was presented by the IND. Nevertheless, the District Court granted the appeal. At the time that the application was made it should have been clear to the IND that the applicant was entitled to take up employment. Organisational problems are not an excuse. Appeal well founded.

E. SPECIFIC ISSUES OF CONCERN

Transposition of provisions specific for workers

Article 7(1)(a) of Directive 2004/38/EC which concerns the right of residence for more than three months of workers and self-employed persons is – more or less literally – transposed by Article 8.12(1a) of the Aliens Decree 2000 and elaborated in Aliens Circular 2000, B10.3.3.

Article 7(3)(a)-(d) of the Directive concerning circumstances under which a Union citizen who is no longer a worker or self-employed person shall retain his status is – again literally – transposed by Article 8.12(2) (a)-(d) of the Aliens Decree 2000 and elaborated in Aliens Circular 2000, B10.3.5.

Article 8(3)(a) of the Directive concerning the documents a worker or a self-employed person has to present for the issuance of a registration certificate is transposed by Article 8.12(5) of the Aliens Decree 2000 which refers to Article 3.29 of the Aliens Regulation 2000 (and its Annex 13). See also: Aliens Circular 2000, B10.3.3, which only contains a reference to the Aliens Regulation 2000.

Article 14(4)(a)-(b) of the Directive concerning the retention of the right of residence of workers, self-employed persons and job seekers is literally transposed by Article 8.16(2)(a)-(b) of the Aliens Decree 2000.

Article 17 of the Directive that provides exemptions for persons no longer working in the host-Member State and their family members are, more or less literally, transposed by Article 8.17(3)-(5) of the Aliens Decree 2000. The specific rules that apply to family members in Article 17(3) and (4) of the Directive are included in Article 8.17(6) and (7) of the Aliens Decree.

Article 24(2) of the Directive (no social assistance during the first three month nor maintenance aid grants for study prior to acquisition of permanent residence) is not transposed in the alien's legislation.

Concerning social assistance, Article 24(2) is transposed by an amendment of Article 11 of the Work and Social Assistance Act (Wet werk and bijstand). This amendment has added the following sentence to paragraph 2 of Article 11: 'with exemption of the instances as enumerated in Article 24, second paragraph of Directive 2004/38'. The Explanatory Memorandum distinguishes four circumstances:

a. no social assistance during the first three months of residence;
b. no social assistance to jobseekers as long as they have not found employment, even if they have resided in the Netherlands for more than three months;
c. other Union citizens, who have resided for more than three months but less than five years in the Netherlands, are entitled to social assistance on an equal footing as nationals. In such instances their right of residence may be terminated on policy grounds. Such a decision should be taken on a case by case basis and should be proportional; and
d. Union citizens who have resided in the Netherlands for more than five years are entitled to social assistance on an equal footing without any consequences for their right of residence.

According to the new Article 2.2 of the Study Grants Act 2000, students from EU, EEA Member States and Switzerland, in principle, enjoy equal treatment as Dutch citizens, irrespective whether they reside in the Netherlands or not, but by a Royal Decree, the Study Grants Decree 2000, groups of students may be designated who are only entitled to a reimbursement of the enrolment fees (the so-called *Raulin*-compensation). According to the new Article 3a and 3b of the Study Grants Decree 2000 (*Staatsblad* 2006, 374) an EU/EEA/Swiss-student, who is not (a family member of) an (ex-)worker or (ex-)self-employed person and who has not (yet) acquired permanent residence, as mentioned in Article 16 of the Directive (legal residence for a continuous period of five years), is entitled to the reimbursement of the enrolment fees only.

Situation of job seekers

Job seekers are treated on the same footing as workers and self-employed (Article 8.12(1) of the Aliens Decree). According to Article 8.12(1a) a job seeker is entitled to a right of residence for more than three months when he is able to prove that he is still looking for a job and has a real opportunity to get a job (see also Aliens Circular B10/3.1). As other EU citizens, a job seeker has to register with the Immigration and Naturalization Service after the period of residence for up to three months. The same restrictions on grounds of public policy, public security or public health apply.

According to Aliens Circular B10/3.1:

"EU/EEA and Swiss nationals are entitled to look for employment in the Netherlands for up to three months. In principle a rights of residence for job seekers continues as long as there are real opportunities to get employment (see also Article 8.16(2b) Aliens Decree).
The right of residence of an EU/EEA/Swiss job seeker can be terminated when the jobseeker:
- constitutes an actual threat to public policy or public security;
- suffers infectious diseases as mentioned in Article 8.23 Aliens Decree.

From the moment the EU/EEA/Swiss national is engaged in genuine and effective employment or is self-employed the provisions of a worker or a self-employed person apply. When the EU/EEA/Swiss job seeker has sufficient resources - not from employment but from other sources - he may be entitled to a right of residence as a non-economically active person".

Other issues of concern

As mentioned above (and in the 2008-2009 national report): in many instances the administrative decisions concerning undesirability are not in conformity with the case law of the Court of Justice, particularly not with the requirement that the personal conduct of the person concerned should be taken into account. A decision to declare a person undesirable implicates that continued residence in the Netherlands is an offence according to Article 197 of the Penal Code. Even EU-citizens are prosecuted regularly according to Article 197 of the Penal Code. Recently an internal instruction was revealed according to which the police are instructed to contact the Immigration and Naturalization Service (IND) immediately when they have arrested EU-citizens based on Article 197 of the Penal Code. The IND reconsiders the decision on undesirability according the EU-law criteria. If the decision proves incompatible with European law, the police informs the EU-citizens that (s)he may request the IND to annul the decision on undesirability.

Chapter II: Members of the Worker´s Family

A decision of the Minister for Immigration and Asylum of 14 December 2010 amending the *Vreemdelingencirculaire* 2000 was published on 22 December 2010 (*Besluit van de Minister voor Immigratie en Asiel van 14 December 2010, WBV 2010/20, houdende wijziging van de Vreemdelingencirculaire, Staatscourant* 22 December 2010, No. 20701). The substantive amendments that concern the position of family members of EU-citizens will be discussed in the appropriate sections of this chapter.

1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

1.1 The definition of family members

No amendments have been made to the definitions of the family members who benefit from Directive 2004/38/EC by virtue of their relationship with an EU-citizen. The amendment to the definition of 'duly attested durable relationship', which was reported in previous reports, has been subject of a number of court decisions. Though the majority of cases concern the evidence submitted to substantiate the claim that a durable relationship exists, the courts also had to deal with the question whether the Dutch reading of this concept complies with European law (e.g. Rechtbank 's-Gravenhage z.p. Utrecht, 23 April 2010, Awb 09/25347 BEPTDN, LJN: BM1997, Rechtbank 's-Gravenhage z.p. Arnhem, 19 August 2010, Awb 09/41938, LJN: BN6033, JV 2010/415 Rechtbank 's-Gravenhage, 7 December 2010, Awb 10/16324 (beroep)/Awb 10/16325 (voorlopige voorziening), LJN: BO7910 and Rechtbank 's-Gravenhage, 26 January 2011, Awb 10/11716 VISUM, LJN: BP3126). The case law reveals that the District Courts are divided in their opinion regarding the question whether the reading of the notion of 'durable relationship' in B10/1.7 of the *Vreemdelingencirculaire* is the correct reading of this concept (Rechtbank 's-Gravenhage z.p. Utrecht, 23 April 2010, Awb 09/25347 BEPTDN, LJN: BM1997 (correct reading), Rechtbank 's-Gravenhage z.p. Arnhem, 19 August 2010, Awb 09/41938, LJN: BN6033, JV 2010/415 (too restrictive reading of a European notion), Rechtbank 's-Gravenhage, 7 December 2010, Awb 10/16324 (beroep)/Awb 10/16325 (voorlopig voorziening), LJN: BO7910, cons. 14 (too restrictive reading) and Rechtbank 's-Gravenhage, 26 January 2011, Awb 10/11716 VISUM, LJN: BP3126 (national concept, not European). See also: Chapter 1).

The position of the courts regarding the evidence that can be submitted to establish that there is a durable relationship is diverse. Though the policy rules explicitly require registration at the same address in the *Gemeentelijke Basisadministratie* [municipal population registration], there are decisions where the courts have accepted other evidence that proves the durable nature of the relationship (e.g. photographs, written statements by third parties) (Rechtbank 's-Gravenhage z.p. Arnhem, 19 August 2010, Awb 09/41938, LJN: BN6033, JV 2010/415. See also:Rechtbank 's-Gravenhage, 26 January 2011, Awb 10/11716 VISUM, LJN: BP3126, cons. 7 (note that the court refers to the Commission Guidelines in its decision) and Rechtbank 's-Gravenhage, 7 December 2010, Awb 10/16324 (beroep)/Awb 10/16325 (voorlopig voorziening), LJN: BO7910, cons. 12-16. See however: Rechtbank 's-

Gravenhage z.p. Rotterdam, 4 March 2010, 09/29746, LJN: BL7188, and Rechtbank 's-Gravenhage z.p. Utrecht, 23 April 2010, Awb 09/25347 BEPTDN, LJN: BM1997). An example of a case in which the District Court considered the evidence regarding the nature of the relationship in detail is Voorzieningenrechter Rechtbank 's-Gravenhage z.p. Amsterdam, 30 March 2010, Awb 10/172, 10/4154, LJN: BM1224, JV 2010/233. Besides evidence of registration at the same address over a period of six months in the *Gemeentelijke Basisadministratie*, as prescribed by B10/1.7 of the *Vreemdelingenciurculaire* 2000, the applicants had submitted photographs of themselves and declarations of family members. The court also found that they had rebutted the contra-evidence (on both occasions when the *Vreemdelingenpolitie* [Immigration police] had paid a visit, the partner was not present and the refusal of the sponsor to put a question to her partner during a public hearing in English was considered as evidence that the partners could not communicate with each other in that language) beyond doubt. A final observation regarding this decision is that the national court when dismissing the counter-argument that the statements of friends and acquaintances are not objective explicitly refers to the Court of Justice's case law that national rules on evidence may not make it impossible or excessively difficult for such evidence to be produced. In the same ruling the Amsterdam District Court observed that neither Article 8.7(4) *Vreemdelingenbesluit*, nor B10/1.7 of the *Vreemdelingenciurculaire* 2000 require evidence that the relationship between partners is 'exclusive'. It is, however, not clear whether the District Court would have acknowledged this requirement as valid, if the defendant had put forward legal arguments why this condition has to be satisfied by partners.

On 3 May 2010 the Judicial Division of the Council of State ruled that as no passport had been submitted there was no lawful residence in the Netherlands and, for that reason, it was not necessary to consider whether the relationship was durable or not. The detention measure was considered lawful, albeit until such moment that evidence establishing the identity of a person is produced (ABRvS 3 May 2010, 201002997/1/V3, LJN: BM5541, JV 2010/247, cons. 2.1.2. See also: Rechtbank 's-Gravenhage, 10 September 2010, Awb 10/30445, LJN: BO0865 and Rechtbank 's-Gravenhage z.p. Amsterdam, 8 April 2010, Awb 10/10610, LJN: BM1692). No durable relationship was assumed by the District Court 's-Hertogenbosch because the statements made by the partners regarding how they had become acquainted were contradictory (Rechtbank 's-Gravenhage z.p. 's-Hertogenbosch, 21 October 2010, Awb 10/8726, LJN: BO2111). The same verdict awaited a couple who had never cohabitated (Voorzieningenrechter Rechtbank 's-Gravenhage z.p. Haarlem, 29 November 2010, Awb 09/36450 & Awb 09/36451, LJN: BP1126).

1.2 Reverse discrimination

The position of family members of Dutch citizens under EU law is subject of *Vreemdelingencirculaire* 2010, B10/5.3 that has been rewritten. The section has been given a new heading, *Familieleden van Nederlanders* [Family members of Dutch nationals], reorganised and rewritten to incorporate the Court of Justice's ruling in the *Eind* case (ECJ case C-291/05 [2007] ECR I-10719). Special attention is given to the point made by the Court of Justice in that decision that a Dutch national returning to the Netherlands after exercising free movement rights can rely on EU law to safeguard a right of residence for family members even if, upon his/her return to the Netherlands, the Dutch national relies on social benefits (B10/5.3.2.1). Further amendments include an explicit reference to the rule in Article 3(1)

Directive 2004/38/EC establishing the territorial scope of that Directive which can only be relied on in a Member State other than the Member State of which the EU citizen is a national (B10/ 5.3.2, *Nederlanders die rechten kunnen ontlenen aan gemeenschapsrecht* [Dutch nationals who derive rights form EU law]).

The policy rules on nationals of other Member States who have moved to the Netherlands under EU rules, but have since become Dutch nationals (formerly subject of B10/5.3.2.2), has been moved to B10/5.3.2.3. *Vreemdelingencirculaire* 2000, B10/5.3.2.2 now sets out the position of service providers, incorporating the Court of Justice's decision in the *Carpenter* case (ECJ case C-60/00 [2002] ECR I-6279). The reading given to this ruling is that where a refusal to admit a family member of a Dutch citizen exercising the right to provide cross-border services (Article 56 TFEU) to the Netherlands amounts to an obstacle to the latter's free movement right, this interference has to be objectively justified, meaning that the refusal must not amount to an interference with the right to family and private life within the meaning of Article 8 ECHR. If this is the case, then interference is only justified if dictated by overriding reasons of public policy and national security. Residence permission has to be granted if the interference cannot be justified.

The first paragraph of the new section B10/5.3.2.3, entitled *Voortzetting van verblijf bij naturalisatie* [Continued residence after naturalization], that was formerly subject of B10/5.2.2.2, sets out the rule developed by the Court of Justice in the *Scholz* case (ECJ case C-419/92 [1994] ECR I-505) that EU free movement rights are not lost following naturalization. The second paragraph is dedicated to the position of family members following naturalization; if rights were acquired prior to naturalization, they remain intact. It continues by spelling out that family ties have to be established before naturalization in order to benefit from this exception. Along the same lines, family reunification has to be completed before naturalization.

1.3 Case law Reverse Discrimination

In 2010, the Judicial Division of the Council of State handed down three decisions on the rights of family members of Dutch citizens. In two decisions the highest Dutch Court in migration cases ruled that reliance on Directive 2004/38/EC by third-country national family members of Dutch nationals is only possible if they were resident in the host-Member State at the time that the Dutch citizen him/herself was resident in that Member State as a beneficiary of Directive 2004/38/EC (ABRvS, 7 September 2010, 201000977/1/V1, LJN: BN6685, (confirming: President Rechtbank 's-Gravenhage, z.p. Amsterdam, 7 January 2010, AWB 08/34633, LJN: BK9765, *JV* 2010/113), JV 2010/437, commentary: H. Oosterom-Staples and *idem*, 201000085/1/V1, LJN: BN6683, (confirming: Rechtbank 's-Gravenhage, z.p. Amsterdam, 4 December 2009, Awb 09/17913, LJN: BL8962, *JV* 2010/2002), *JV* 2010/438). In both cases a reference is made to *Singh* (ECJ case C-370/90 [1992] ECR I-4265) and *Eind* as well as Article 35(2) of Directive 2004/38/EC. In one of the cases it is explicitly mentioned that the *Metock* case (ECJ case C-C-127/08 [2008] ECR I-6241) does not apply as that case concerns the position of family members in the host-Member State, not the Member State of which the EU-citizen is a national (ABRvS, 7 September 2010, 201000085/1/V1, LJN: BN6683, *JV* 2010/438). A key issue in the third case was whether Article 3(1) Directive 2004/38/EC has been implemented correctly in Dutch law (ABRvS, 9 November 2010, 201003131/1/V1, *JV* 2011/9, with commentary H. Oosterom-Staples). The origins of

this case are a Dutch SIS-report and an entry ban, which operate as an obstacle for a third-country national family member of a Dutch citizen to exercise free movement rights in another Member State. All cases share that the court found no violation of Directive 2004/38/EC (examples of cases in which Directive 2004/38/EC is considered applicable as residence rights have been accorded by other Member States are: Rechtbank 's-Gravenhage zp Haarlem, 11 November 2010, Awb 10/10677, LJN: BO5261 and Rechtbank 's-Gravenhage, 2 December 2010, Awb 10/16378, LJN: BP2652).

In *JV* 2010/437 the applicant had travelled from his country of origin to the Netherlands where he had taken up residence. During his partner's stay in Belgium, the host-Member State, he had visited her in that Member State on five occasions, but had never resided there himself. The Judicial Division of the Council of State found that as there had been no genuine and effective residence in the host-Member State by the third-country national partner there was no deterrence of the EU-citizen's right to free movement upon return to the Netherlands and, therefore, no obligation for the Dutch authorities to apply Directive 2004/38/EC to the case at hand.

In case JV 2010/438 the relationship between the partners did not exist at the time that the Dutch citizen exercised her right to free movement in Spain. In the light of this circumstance the Judicial Division of the Council of State argued that no deterrence of the right to free movement arises if the third-country national partner is not treated as a beneficiary of Directive 2004/38/EC by the Dutch authorities. This ruling was followed by the District Court Haarlem that found that the evidence submitted in the case under consideration by that court did not prove genuine and effective residence in Germany (Rechtbank 's-Gravenhage, z.p. Haarlem, 24 November 2010, Awb 10/29610, 10/29611, LJN: BO7172).

On 9 November 2010 the Judicial Division of the Council of State reversed the decision of the District Court Amsterdam of 3 March 2010 (Rechtbank 's-Gravenhage, z.p. Amsterdam (mk), 3 March 2010, Awb 08/44901, *JV* 2010/203. See Dutch report 2009-2010) establishing that Article 8.7 Vb was an incorrect implementation, i.a. a too narrow reading, of Article 3(1) Directive 2004/38/EC. The case concerned a Dutch citizen resident in Belgium who could not be joined by her husband as the Belgium authorities had refused to issue a short-stay visa to the third-country national spouse as he was subject of a Dutch SIS-report (ABRvS, 9 November 2010, 201003131/1/V1, *JV* 2011/9, with commentary H Oosterom-Staples). The Judicial Division of the Council of State argues that the Dutch authorities are not the competent authorities in cases concerning Dutch nationals who envisage admission and residence in a Member State other than the Netherlands. The inclusion of 'the Netherlands' in Article 8.7 *Vreemdelingenbesluit* is, therefore, not an incorrect reading of Article 3(1) Directive 2004/38/EC. As, at the time when the Dutch authorities made the SIS-report and adopted the entry ban, as well as at the time when the request to lift these measures was filed, the third-country national was not a beneficiary of Directive 2004/38/EC – the Belgium authorities would not grant him entry permission due to the aforementioned Dutch SIS-report, therefore he could not join his Dutch spouse in Belgium – the Judicial Division of the Council of State found that the Dutch authorities were not obliged to reconsider the entry ban in the light of Article 27(2) of Directive 2004/38/EC. According to the Judicial Division of the Council of State the correct proceedings are the following. The spouse must apply for residence permission in Belgium. The authorities of that Member State will then have to consider whether he enjoys rights under Directive 2004/38/EC (including Article 27(2) of that Directive). If the Belgian authorities decide to grant residence permission, only then do the Dutch authorities have to remove the SIS-report (Article 25(1) Schengen Implementing

Agreement). When the spouses return to the Netherlands, they can apply for reconsideration of the entry ban in the light of Directive 2004/38/EC. Though strictly speaking no fault can be found with this reading, this approach can be criticized as 'formalistic' and does not contribute towards the *effet utile* of free movement rights, in particular as it had already been established that the Belgium authorities were unwilling to consider the application for a short-stay visa under the favourable conditions set out in Directive 2004/38/EC due to the Dutch SIS-report (See for a comparable decision, albeit concerning the spouse of a non-Dutch EU-citizen: ABRvS, 6 December 2010, No. 200907934/1/V1, LJN: BO7026, JV 2011/49).

1.4 Ruiz Zambrano

On 31 March 2011 the Minister for Immigration and Asylum informed the Tweede Kamer on the implementation of the Court of Justice's decision in the *Ruiz Zambrano* case (Tweede Kamer 2010-2011, 19 637, 31 March 2011, No. 1408, *Brief van de Minister voor Immigratie en Asiel* [Letter from the Minister for Immigration and Asylum]). Recalling earlier case law of the Court of Justice, the Minister argues that the purpose of EU-citizenship is not to extend European law to include internal situations. He then acknowledges that the decision in *Ruiz Zambrano* may mean that European law has to be applied where no free movement rights have been exercised. The concise explanation offered by the Court of Justice for its decision in *Ruiz Zambrano* he sees as a justification for the conclusion that the intention of that court was to offer a tailor-made solution for the case at hand; two Belgium minors residing in Belgium with the rest of their family who are third-country nationals. He argues that unlike Belgium law, Dutch law does not provide for Dutch citizenship at birth to prevent children being born stateless; they (read: their parent(s) on their behalf) can opt for Dutch citizenship after three years of lawful residence. Therefore, he considers that the implications of the *Ruiz Zambrano* judgment for the Netherlands will be limited. In cases where the parents of a child born without a nationality have opted for Dutch citizenship for that child in accordance with Dutch law, the third-country national parent will be granted residence permission if the child is dependent of its third-country national parent. Time will reveal whether the Minister's assessment of the implications of the *Ruiz Zambrano* judgment for the Netherlands is correct.

Case law

Though it was argued that AG Sharpston's Conclusion in the *Ruiz Zambrano* case required the Dutch authorities to take into account the interests of the Dutch son, to be raised and cared for in the country of which he is a national, the Amsterdam District Court dismissed the argument that at that moment in time (21 January 2011) the case should not be treated as purely internal to the Member State (Rechtbank 's-Gravenhage, zp Amsterdam, 21 January 2011, Awb 10/32543, Awb 10/14348, LJN: BP5360). However, the decision to return the third-country national mother to Greece, the Member State responsible for the processing of the asylum claim, was considered insufficiently substantiated as the interests of the family members had not been taken into due consideration. The case is one of the many Greek Dublin claims in which interim measures had been adopted by the ECtHR.

On 1 June 2011, the Utrecht District Court, relying on a decision of the Groningen District Court (Rechtbank 's-Gravenhage zp Groningen, 6 May 2011, Awb 11/3449, LJN:

BQ3576), argued that a difference in facts does not automatically mean that the Court of Justice's ruling in *Ruiz Zambrano* does not apply (Rechtbank 's-Gravenhage zp Utrecht, 1 June 2006, Awb 10/34857 VK, Awb 10/34859, Awb 10/34860 VL a.o., LJN: BQ7068). As the applicant had not rebutted the defendant's claim that one of the parents is a Dutch national and, therefore, the *Ruiz Zambrano* judgment does not apply, the child is considered not to have been withheld the effective enjoyment of his rights as an EU-citizen. The same conclusion was reached by the District Court in Roermond regarding Dutch children whose father is a Dutch citizen and mother a third-country national (Rechtbank 's-Gravenhage zp Roermond, 26 March 2011, Awb 10/37591, LJN: BQ0062, JV 2011/234). The Groningen District Court, however, had ruled earlier that considering the facts of that case - a minor Dutch citizen whose third-country national parent is responsible for his care - expulsion had to be stayed until it had been determined whether, in the light of Articles 7 and 24 of the EU's Charter on Fundamental Rights, an expulsion measure is a proportional infringement of EU-rights, as it can be assumed that a child under the age of two will have to accompany its parent who is the primary caretaker when expelled (Rechtbank 's-Gravenhage zp Groningen, 6 May 2011, Awb 11/3449, LJN: BQ3576).

In two cases the Amsterdam District Court ruled that the decision in the *Ruiz Zambrano* case had shed the necessary doubts whether the initial decision should be reconsidered. Proceedings for interim measures were considered not the appropriate proceedings for such reconsideration. The proceedings concerned a refusal to issue a residence permit (Rechtbank 's-Gravenhage zp Amsterdam, 3 May 2011, Awb 11/14127, Awb 11/14148) and the execution of an expulsion measure (Rechtbank 's-Gravenhage zp Amsterdam, 16 March 2011, Awb 10/44784, Awb 10/44785, JV 2011/206). The Haarlem District Court, however, found that as the child with Dutch citizenship had been born after the decision against which proceedings had been instigated, this fact could not have been considered by the administration when reviewing the initial decision and, therefore, the *ex tunc* rule in national procedural law opposed the application of the *Ruiz Zambrano* decision. The District Court explicitly states that Directive 2004/38/EC does not oblige Member States to reconsider cases *ex nunc* (Rechtbank 's-Gravenhage zp Haarlem, 26 April 2011, Awb 10/12844, Awb 08/42013).

Publications

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P. Boeles, Case note ECJ case C-34/09, Ruiz Zambrano, *Jurisprudentie Vreemdelingenrecht* 2011/146

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H.U. Jessurun d'Oliveira, Unieburger in eigen land, 2 *Asiel en Migrantenrecht* (2011-2), p. 78-79

H. Oosterom-Staples, Case note ABRvS, 7 September 2010, 201000977/1/V1, *Jurisprudentie Vreemdelingenrecht* 2010/437

S. van Walsum, Jurisprudentie over migratierecht en gezinsleven. Deel I: de Europese richtlijnen, 1 *Asiel en Migrantenrecht* (2010-9) para. 1– 1.3

2. ENTRY AND RESIDENCE RIGHTS

No amendments were made to the Aliens Act and the Aliens Decree regarding entry and residence of third-country national family members. An amendment to Article 3.34h of the Aliens Regulation has meant that all applicants for a residence permit issued under Directive 2004/38/EC lodged after 1 January 2011 are charged € 43 (Article I B *Regeling van de Minister voor Immigratie en Asiel van 22 December 2010, No. 5678736/10, houdende wijziging van het Voorschrift Vreemdelingen* 2000 (honderdeneerste wijziging). *Staatscourant* 30 December 2010, No. 20991).

Judicial Practice

In 2010-2011 the Dutch courts were asked to rule on various issues relating to entry and residence rights of third-country national family members. They concern: the application of Directive 2004/38/EC where the applicant wants to reside in a Member State other than the Netherlands, but is experiencing problems due to a SIS-report and/or entry ban adopted by the Dutch authorities, the obligation to report in Articles 21 and 22 of the Schengen Implementing Agreement and Article 21(d) of the Schengen Borders Code, the issuing of short-stay visa, departure from the Netherlands to take up residence in another Member State where immigration detention is imminent and detention following entry refusal. To start two decisions of a procedural nature merit consideration.

On 21 February 2011, the Judicial Division of the Council of State established that though Directive 2004/38/EC does not oppose, there is no competence under Dutch law for the authorities to determine the moment when lawful residence in accordance with that Directive commenced (ABRvS, 21 February 2011, 201003057/1/V2, LJN: BP5947). In terms of rights, that Court recognised that the applicants certainly had an interest in the determination of the moment when lawful residence commenced. It confirmed that the residence document issued is merely evidence of lawful residence, but does not determine when it commenced.

The other decision is the Utrecht District Court's ruling on Articles 9 and 10 of Directive 2004/38/EC (Rechtbank 's-Gravenhage z.p. Utrecht, 5 August 2010, Awb 09/16306 BEPTDN, LJN: BN3363). According to this court, before the judiciary can consider the case under the aforementioned provisions, the administrative authorities have to have had an opportunity to decide whether a person is entitled to a residence permit in his/her capacity as a family member of a beneficiary of Directive 2004/38/EC. In the case at hand the father is holder of a residence permit evidencing the right to permanent residence in Article 16 of Directive 2004/38/EC.

Article 3(1) Directive 2004/38/EC and Article 25(2) SIA

As discussed in section 1 of this chapter, the Judicial Division of the Council of State finds that Directive 2004/38/EC only applies to cases where the third-country national family member is resident in the host-Member State at the same time as the EU-citizen. The case discussed there concerned the third-country national family member of a Dutch citizen claiming to be a beneficiary of Directive 2004/38/EC in order to have a Dutch SIS-report and entry ban (*ongewenstverklaring*) reconsidered. On 6 December 2010, the Judicial Division of the Council of State ruled on a similar case, albeit where the EU-citizen was not a Dutch citizen but a German national resident in Germany with the children born from that marriage (ABRvS, 6 December 2010, 200907934, LJN BO7026, JV 2011/49, reversing: Rechtbank

's-Gravenhage z.p. 's-Hertogenbosch, 14 September 2009, Awb 08/34755, LJN: BJ8526). Like in the case of the Dutch citizen, the Judicial Division of the Council of State finds that Article 27(2) of Directive 2004/38/EC could not be invoked to contest the Dutch entry ban (*ongewenstverklaring*) because the third-country national family member had not 'accompanied' or 'joined' his EU-citizen family member in the Netherlands as required for the application of Directive 2004/38/EC. As far as the SIS-report is concerned, it argues that where a SIS-report concerns an individual with a right of residence in a Member State, Article 25(2) SIA obliges the Dutch authorities to consult the Member State that has issued a residence permit, in this case German, once the entry ban becomes irreversible. If in this case the German authorities do not revoke the right of residence, the SIS-report has to be removed from the SIS-database (See however: Rechtbank 's-Gravenhage, 12 July 2010, Awb 10/15305, LJN: BN3110 where the District Court ruled that the mere fact that the residence permit issued by the Spanish authorities was still valid obliged the Dutch authorities to apply Directive 2004/38/EC to the facts of the case before issuing an entry ban).

In a case concerning the legitimacy of a decision to withhold entry permission (Article 13 Schengen Borders Code) and subsequent immigration detention, the Haarlem District Court read Directive 2004/38/EC as according third-country national family members the right to move within the European Union subject to the conditions set out in Article 6(2) of the aforementioned Directive for the purpose of accompanying and joining their EU-citizen family member. In this case European rights were enjoyed in any case from the moment the Hungarian spouse joined the third-country national family member, but also from the moment that the third-country national family member expressed his intention of forward travel to join his EU-citizen spouse in Hungary (Rechtbank s-Gravenhage z.p. Haarlem, 12 August 2011, Awb 10/27668, LJN: BO4516, JV 2011/30).

Obligation to report presence in the Netherlands

A third-country national who is a family member of an EU-citizen has to satisfy the obligation to report his/her presence in the Netherlands in Articles 21 and 22 of the Schengen Implementing Agreement and Article 21(d) Schengen Borders Code (Regulation (EC) No. 562/2006) if they do not accompany or join the EU-citizen family member (ABRvS 26 May 2010, 200908732/1/V3, LJN: BM6096, JV 2010/276).

Article 5(1) Directive 2004/38/EC: short-stay visa application

On 12 April 2011, the Amsterdam District Court ruled that any decision concerning visa (with the exception of return visa and long-stay visa, the so-called *machtiging tot voorlopig verblijf*) has to be taken in accordance with the Visa Code (Regulation (EC) No. 810/2009) and Directive 2004/38/EC. With the exception of establishing the competence to issue visa, the rules in the *Soverein Besluit* have been replaced by the aforementioned legislative acts. In this case the time allotted for the processing of short-stay visa applications had not been observed. Damages are awarded (Rechtbank 's-Gravenhage, z.p. Amsterdam, 12 April 2011, Awb 10/41326).

On 26 January 2011 the The Hague District Court held that as permanent residence was envisaged by a third-country national claiming a durable relationship with an EU-citizen, the application for a short-stay visa could be turned down because it could be assumed that the applicant intended to stay in The Netherlands permanently. Before reaching this conclusion the court had established that the claim that a durable relationship within the meaning of

Article 3(2) Directive 2004/38/EC existed was unfounded (Rechtbank 's-Gravenhage, 26 January 2011, Awb 10/11716 VISUM, LJN: BP3126).

Departure from the Netherlands to take up residence in another Member State
In a number of cases the Judicial Division of the Council of State ruled on Article 59(3) *Vreemdelingenwet*, establishing that immigration detention is not executed or terminated if departure is desired by the individual and there is an opportunity to leave the Netherlands, where family members of EU-citizens have expressed their intention to move to a different Member State. In all cases that Court found that insufficient evidence had been submitted to substantiate the claim that admission to the other Member State was guaranteed.

In its ruling of 18 January 2011, it referred to the Court of justice's decision in the *MRAX*-case (ECJ case C-459/99 [2002] ECR I-6591) to argue its case that as only a copy of the identity document had been submitted, there was insufficient proof of identity and therefore no evidence that the right of residence in Germany derived from Articles 5 and 6 of Directive 2004/38/EC (ABRvS 18 January 2011, 201009741/1/V3, LJN: BP1919).

On 6 May 2011, the Court was not convinced that the conditions as set out in Article 3(1) Directive 2004/38/EC were satisfied, as submission of a marriage certificate by the third-country national spouse was not acknowledged as evidence that residence in France, the Member State of which the EU-citizen is a national, is guaranteed. Likewise the statement that six months residence in Paris entitled the third-country national to a right to be issued a residence permit by the French authorities was found insufficient. This was also the case for the spouse's letter that is labelled a 'subjective rather than objective source' (ABRvS 6 May 2010, 201001849/1/V3, LJN: BM5535, JV 2010/249, reversing Rechtbank 's-Gravenhage z.p. Roermond, 12 February 2010, Awb 10/3898). Six days later the same court found that as the applicant and spouse had merely indicated an intention to leave the Netherlands for Belgium or France where family members were resident, admission to one of those Member States had not been established (ABRvS 12 May 2010, 201002955/1/V3, LJN: BM5538, JV 2010/252, reversing Rechtbank 's-Gravenhage z.p. Dordrecht, 19 March 2010, Awb 10/6692, JV 2010/174). In both cases it was undisputed that the applicant possessed a valid passport.

3. IMPLICATIONS OF THE METOCK JUDGMENT

2010-2011 has not witnessed any legislative or policy amendments to conform to the ECJ's ruling in the *Metock* case. The coalition government has announced its intention to open negotiations at the European level with a view to put a halt to the so-called 'Europe route', if necessary through amendment of Directive 2004/38/EC (see national fiche). In its decision of 7 September 2010 (see section 1.3 of this chapter) the Judicial Division of the Council of State ruled that the *Metock* case does not apply to cases concerning family members of a Dutch national invoking Directive 2004/38/EC as the legal basis for their right of residence in the Netherlands. The ruling in the *Metock* case, that no prior residence can be required to benefit from the aforementioned Directive, so it argued, concerns the situation in the host-Member State and not the rights of family members in the Member State of which the EU-citizen is a national (so-called return cases).

4. ABUSE OF RIGHTS, I.E MARRIAGES OF CONVENIENCES AND FRAUD

Article 8.25 *Vreemdelingenbesluit,* that implements the right to take measures in cases where abuse of free movement rights is established (Article 35 Directive 2004/38/EC), and the corresponding rules in *Vreemdelingencirculaire* 2000, B10/7.1 have not been amended.

An envisaged amendment to the Civil Code and several related legislative acts, required by the entry into force of the *Wet elektronische dienstverlening burgerlijke stand* [Act on online services for the Registary Office], will mean that where a marriage is envisaged and at least one of the partners is not a Dutch national, the spouses-to-be will have to state in writing that their marriage is not a marriage of convenience. This so-called 'own statement' (*eigen verklaring*) will replace the statement of the head of the local police concerning lawful residence. The 'own statement' will be filed and can be used by the Immigration and Nationality Department to prevent and combat marriages of convenience. False statements will amount to a criminal offence (Article 227-227b of the Criminal Code), justify termination of the right of residence and will be the legal basis for an administrative fine once the new Immigration rules enter into force. A new section will be added to Article 1:58 of the Civil Code explicitly stating that no marriage can be convened if the primary intention of the marriage is to acquire a right of residence in the Netherlands. An exemption will be provided for non-nationals who have a permanent residence status or derive a right of residence from European law. The use of the word *gemeenschapsonderdaan* suggests that this exemption will include the third-country national spouse-to-be of an EU-citizen. This is not, however, explicitly spelled out (Tweede Kamer 2009-2010, 32 444, Wijziging van Boek 1 van het Burgerlijk Wetboek en enige andere wetten in verband met de inwerkingtreding van een elektronische dienstverlening bij de burgerlijke stand (*Wet elektronische dienstverlening burgerlijke stand)*, No. 4, p. 7-8).

Case law and decision National Ombudsman

On 27 January 2011 the Haarlem District Court ruled on a case in which the Immigration and Nationality Department had withdrawn the right of residence of the Egyptian spouse of a Hungarian national following further investigations with a view to establishing whether the suspicions that the marriage was a marriage of convenience were correct (Rechtbank 's-Gravenhage, zp Haarlem, 27 January 2011, Awb 10/37306, Awb 10/37307, LJN: BQ2080). As follows from the facts of the case, the reason for further investigations regarding the nature of the marriage was an increasing number of applications for authentication of marriage certificates evidencing consular marriages between Egyptian nationals and nationals from the CEE-Member States and Portugal issued by the Egyptian Embassy in The Hague. The District Court Haarlem finds that though Egyptians married to nationals from CEE-Member State and Portuguese nationals are specifically targeted, it is only the consular marriages at the Egyptian Embassy in The Hague that are picked out for further investigation and, therefore, the checks are not 'systematic by nature' thus permitted under EU-law, as set out in the Commission's Guidelines of 2 July 2009 (COM(2009) 313). In this case the Dutch authorities were found to have substantiated their suspicion that the marriage qualifies as a marriage of convenience by establishing contradictory statements made by the spouses regarding how they met and the events on their wedding day.

As the claim that Article 35 of Directive 2004/38/EC applied had not been not substantiated in the initial decision, the District Court in The Hague did not consider the facts of the case in the light of this provision. The administration had claimed that if the correct infor-

mation had been provided at the time of application, residence permission would have been refused (Rechtbank '-Gravenhage, 2 December 2010, Awb 10/16378, LJN: BP2652).

A complaint concerning the intrusive nature of checks by the Immigration Police *Haaglanden* in cooperation with the Immigration and Nationality Service into the nature of the marital relationship was found well-founded by the National Ombudsman (Report Nationale Ombudsman 2010/194, retrieved from http://rapporten.nationale ombudsman.nl/rapporten/2010/194). Though the National Ombudsman has no reason to assume that the authorities interrogating the applicant intended to either threaten her through their behaviour, or act aggressively or improper, he does find that as professionals they must always be aware of the state of the person they are interviewing and act accordingly. Therefore, they should have terminated the interview allowing applicant to contemplate the information that her spouse had been married before and that children had been born from this relationship; a fact unknown to her, rather than continuing the interview and expecting the applicant to decide there and then whether she wanted to continue her relationship with her spouse, the father of her unborn child. As a statement made by applicant during her interview is the starting point for the interview with her spouse, the complaint regarding the proceedings during the interview with the latter is also considered well-founded. The house visit is labelled 'unnecessary' and is considered to have infringed the right to respect of private life.

5. ACCESS TO WORK

Rules on the right to take up paid employment as a family member of an EU-citizen, either as an employee or self-employed person, are found in *Vreemdelingencirculaire* 2000, B10/5.2.2., entitled *Familielid niet zelf EU/EER- of Zwitsers onderdaan* [Family member who is not a national of an EU or EER Member State or a citizen of Switzerland]. This section now starts by setting out the right to take up paid employment in Article 23 Directive 2004/38/EC and then spells out the consequences for the Netherlands; access to the labour market is not subject to the possession of a work permit (*tewerkstellingsvergunning*) and the residence permit is endorsed with the note that access to the labour market is not subject to the possession of a work permit. The labour market position in the Netherlands of family members of EU-citizens who themselves are not resident in the Netherlands is dealt with in the last sentence of this paragraph; a work permit is compulsory, unless otherwise provided for in the *Wet Arbeid Vreemdelingen*.

Case law

The right to take up employment is evidenced by a sticker that is placed in the passport bearing the words 'employment permitted'. In three cases concerning third-country national family members of EU-citizens a sticker establishing that no right to take up an economical activity considering their residence status, was affixed to their passport (Rechtbank 's-Gravenhage, zp Amsterdam, 5 November 2010, Awb 09/35659, LJN BO 7515, *JV* 2011/60, Rechtbank 's-Gravenhage, z.p. Amsterdam, 4 May 2011, Awb 10/29769 and Rechtbank 's-Gravenhage, z.p. Amsterdam, 11 May 2011, Awb 11/10661). In a forth case, no violation of Article 23 Directive 2004/38/EC was established, as the conditions to qualify as beneficiary of Directive 2004/38/EC were found not to have been satisfied (President Rechtbank 's-Gravenhage, zp Amsterdam, 11 May 2011, Awb 11/10661, LJN: BP5960). Before considering the legality of this act, the District Court established and confirmed that, for the purpose of

legal redress, the act of affixing a sticker as evidence of the right to take up an economical activity is to be treated as a legal decision that can be contested under Article 72(3) *Vreemdelingenwet*.

On the substance the District Courts find that the State acted unlawfully, as, at the moment of the application, it had been established beyond doubt that the applicant was a beneficiary of Directive 2004/38/EC and, by virtue of that fact, enjoyed the right to take up paid employment from the moment the application for a right of residence as a family member of an EU-citizen had been lodged; the sticker affixed to the passport qualifies as a declaratory act. If there is no discussion regarding the documents submitted to assess the applicant's position under EU law and there is no reason justifying further investigations whether the claim that the applicant is a family member of an EU-citizen is correct or where the relationship as a family member of a EU-citizen has already been recognized as generating rights under Directive 2004/38/EC, there is an EU-right to take up an economical activity. The District Court emphasizes the declaratory nature of documents evidencing rights which are derived from European law and that the right to take up an economical activity is such a right as it follows directly from Article 23 Directive 2004/38/EC. (See for a case where no right of residence was derived from EU law, because the child with whom residence was envisaged did not satisfy the requirement of sufficient financial means: Voorzieningenrechter Rechtbank 's-Gravenhage, zp Haarlem, Awb 10/30126, LJN: BP5960).

6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

Nothing to report.

Chapter III: Access to employment

A) ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

a.1 Equal treatment in access to employment (e.g. assistance of employment agencies).

Article 1(1)(b) of the General Equal Treatment Act (*Algemene wet gelijke behandeling)* explicitly forbids discrimination on the basis of nationality. The prohibition applies to all employment relations outside the public sector. Article 5(1) explicitly provides that the prohibition applies to job offers, recruitment procedures, private employment agencies, concluding and ending an employment contract, employment conditions, access to vocational and other training during or before the job, promotion and workplace conditions. The Act explicitly allows for only two situations where distinctions on the ground of nationality (in the meaning of citizenship) are allowed: (1) where it is provided explicitly in a statutory provision or in a written or unwritten rule of international law, and (2) in cases where a distinction on the ground of nationality is required by the context, such as the composition of a national sports team (Articles 5(5) and (6) of the Act and Royal Decree of 21 June 1997, *Staatsblad* 1997, No. 317, *Besluit gelijke behandeling*, *Staatsblad* 1997, 317). The Act established the Equal Treatment Commission (*Commissie Gelijke Behandeling*). A worker or an applicant may file a complaint with this Commission, if (s)he deems that an employer has violated the provisions of this Act. There is equal access to assistance of employment agencies.

a.2 Language requirements

There are no explicit statutory requirements as to the knowledge of the Dutch language for private employment. In practice, for most white collar jobs applicants will be required to be proficient in the Dutch language. According to the Minister of Social Affairs the requirement of Dutch language proficiency belongs to the competence of the employer. (Tweede Kamer 2009-2010, 9 September 2010, 29 407, No. 107, p. 2)

An Italian filed a complaint with the Equal Treatment Commission because he did not get a job as an ICT frontline helpdesk employee because he did not fulfil the Dutch language requirements. According to the Italian this was discrimination on the grounds of nationality. According to the Equal Treatment Commission it is not a case of discrimination on the grounds of nationality. It is not the task of the Commission to pass judgment on the level of Dutch language skills of the Italian (see: Opinion 2011-44 www.cgb.nl)

B) ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

For an up to date overview see Part II, Country Files, of the report *Free Movement of European Union Citizens and Employment in the Public Sector, Current Issues and State of Play* by Jacques Ziller, 2010, p. 109-115. The remark on p. 113 is of particular interest:

> Available information reveals two potential issues of compliance with EU law.
> *'First*, the criteria indicated by the *Civil Service Act* in order to reserve posts to nationals, i.e. "*functions of confidence*", does not coincide with the criteria for the application of Article 45(4) TFEU. Vagueness of the criteria used in the legislation reserving posts to Dutch nationals does not facilitate analysis, especially as there is no official comprehensive list of the relevant positions involving the exercise of "*functions of confidence*".
> *Second*, the absence of legal provisions on the recognition of seniority acquired in other EU Member States may generate obstacles to the free movement of EU-citizens, including Dutch nationals, who make use of their right to free movement'.

See http://ec.europa.eu/social/main.jsp?catId=465&langId=en.

b.1 Nationality condition for access to positions in the public sector

The Bill abolishing the requirement of Dutch nationality for the appointment as a notary is still pending. The Minister informed the First Chamber in October 2010 that he will wait for the judgment of the CJ EU in Case C-47/08 (*Eerste Kamer* 31040, No. N). The Opinion of the Advocate General in that case argues against a nationality requirement. On 24 May 2011, the Court ruled along the lines of the Opinion. Member States may not reserve access to the profession of notary to their own nationals. Even if the activities of notaries pursue objectives in the public interest, they are not connected with the exercise of official authority within the meaning of European law.

Still pending is the infringement procedure against the Netherlands on this issue (Case C-157/09).

b.2. Language requirements

Until recently, there were few, if any, explicit statutory requirements as to the knowledge of the Dutch language for appointment in posts in the public sector, although, in practice, proficiency in the Dutch language is required for most public service jobs. The legislation implementing Directive 2005/36/EC provides some examples of that practice. The explanatory memoranda on the ministerial regulations on the recognition of professional qualifications of police officers and fire-brigade officers, explicitly mentions that the officers concerned have to have obtained sufficient knowledge of the Dutch language to perform their job. Language knowledge is not to be tested during the procedure on the recognition of the qualifications acquired in another Member State, but afterwards in the appointment procedure. Moreover, the ministerial regulation on the recognition of professional qualifications of candidate notaries and candidate bailiffs stipulate that the aptitude test is to be conducted in Dutch. The same system applies for child care personnel: (*Staatscourant,* 17 June 2010, No. 9216).

The Bill mentioned above (sub-section b.1) includes a provision requiring knowledge of the Dutch language as an explicit condition for appointment as a notary. Apparently, this language condition has been applied implicitly, without statutory basis, until now. There was a presumption that the requirement of a Dutch law degree ensured that the job applicant had sufficient knowledge of the Dutch language to perform the job. The Bill is still pending.

b.3. Recognition of professional experience for access to the public sector

There are no special statutory rules on this issue in the Netherlands.

b.4. Other aspects of access to employment

Nothing to report.

Chapter IV: Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

Working conditions in the public sector

There are no separate rules providing special working conditions for persons without Dutch nationality employed in the public sector.

2. SOCIAL AND TAX ADVANTAGES

Employers can get a discount for 1 to 3 years on the payment of the contributions for employees they hire, who enjoy a Dutch unemployment or disability benefit at that moment. It is questionable whether this is an obstacle to free movement of workers. The Dutch tax authority's reply was negative. The purpose of this discount is to reduce the burden on the Dutch social security system and, therefore, justified.

2.1. General situation as laid down in Art. 7 (2) Regulation 1612/68

Nothing to report.

2.2. Specific issues: the situation of jobseekers

Case C-22/08 and C-23/08, 4 June 2009, Athanasios Vatsouras and Josif Koupatantze v *Arbeitsgemeinschaft (ARGE) Nürnberg 900*
In this case the CJEU confirmed that the concept of worker is independent of the limited amount of remuneration and a short duration of the professional activity. It also ruled that a job-seeker can receive a benefit of a financial nature intended to facilitate access to employment. Such a benefit is not seen as social assistance, which Member States may refuse to job-seekers according to Article 24(2) Directive 2004/38/EC. To be entitled to such a benefit the job-seeker can be required to establish genuine links with the labour market of the Member State, for example by providing evidence that the person has actually sought work in that Member State for a reasonable period.

In the Netherlands, the *Vatsouras* decision led to questions in parliament (Tweede Kamer 2009-2010, *Aanhangsel van de Handelingen,* No. 684). The benefit enjoyed under the Dutch *Wet Werk en Bijstand (WWB*) is classed as a social assistance benefit and not as a benefit that facilitates access to employment, like the German benefit. The government confirmed that an economically active EU-citizen who has performed effective and genuine activities and has become involuntary unemployed has a right to a WWB benefit during the six months period he retains his status as a worker (according to Article. 7(3)(c) Directive 2004/38/EC). After that period the Immigration and Naturalisation Service decides on an individual basis whether a WWB benefit justifies termination of the right of residence because the EU-citizen has

become an unreasonable burden on the financial means of the host-Member State. In April 2011 there was an announcement that the rules on expulsion of EU nationals on the ground of reliance on social assistance (laid down in Aliens Circular B.10/4.3) will be made more restrictive (Tweede Kamer 29 407, No 118).

Chapter V: Other obstacles to free movement of workers

The National Ombudsman received a complaint concerning a refusal of the Tax authorities to issue a *Burgerservicenummer* (Citizens Service Number) to his grandchildren, Dutch citizens, but not resident in the Netherlands. The applicant claimed that he needed a *Burgerservicenummer* for his non-resident Dutch grandchildren as he wanted to open a bank account in their name and that the banks will only open accounts after the *Burgerservicenummer* has been communicated (Report Nationale Ombudsman 2010/88, retrieved from: http://rapporten.nationale ombudsman.nl/rapporten/2010/088?result=0).

Information received by the National Ombudsman reveals that a *Burgerservicenummer* is not required from non-residents who want to open a bank account (Article 47b *Algemene Wet inzake rijksbelastingen* [General Act of State Taxes]). Submission of an identity document in which the *Burgerservicenumber* is recorded is only compulsory if that document was issued by the Dutch authorities to residents of the Netherlands. Other means of proof are, however, accepted and no *Burgerservicenummer* is required for accounts in the name of non-residents.

To avoid problems in the future the Ministry of Finances sent a letter to the *Nederlandse Vereniging van Banken* (Dutch Bank Association) on 2 November 2009 clarifying the law on this point. In addition, letters were drafted explaining the law regarding *Burgerservicenummers* and bank accounts, which can be used when banks require a *Burgerservicenummer* prior to opening a bank account for a non-resident. The National Ombudsman found no fault on behalf of the Tax authorities.

Though this complaint concerned a Dutch national whose grandchildren are residents of the US, the action pursued should remove any obstacle experienced by EU-nationals resident in the Netherlands who wish to open a bank account for their family members who are not resident in the Netherlands or who do not have an official document issued by the Dutch authorities (in practice a driving licence).

Chapter VI: Specific Issues

1. FRONTIER WORKERS

In 2010-2011 Eures Maas Rijn published six short information brochures on social security issues for frontier workers living and working in Belgium, Germany or the Netherlands. See: http://www.eures-emr.org

In 2011 the Social Insurance Bank published a *Vergelijkend Overzicht voor werknemers* (Comparative Overview for Workers) in which a comparison is made between the Dutch and Belgian social security rules See: http://www.svb.nl/Images/9070NO_0111.pdf

The Belgian system of educational vouchers, which includes a residence clause, means that Dutch (as well as French, German and Luxembourg) frontier workers are not entitled to these vouchers. In February 2010 questions were asked in the European Parliament whether this is in line with Article 7(2) Regulation (EEC) No. 1612/68. (Questions to the European Parliament E-0876/10). But there has been no answer yet.

As mentioned in the 2009-2010 report, on 26 June 2009 the Supreme Court ruled in accordance with the decision of the CJEU in the *Renneberg* case (C-527/06) that Mr. Renneberg can deduct from his income generated in the Netherlands for the purpose of paying taxes the difference between the *huurwaardeforfait* (rateable value) for his house in Belgium, to be calculated as if the house was located in the Netherlands, and the mortgage he has paid for the years 1996 and 1997 (Supreme Court, 26 June 2009, No. 39258bis, VN 2009/33.14). The tax authorities, however, demanded under the Income Tax Act 2001, that frontier workers as Mr Renneberg choose to be registered for the Dutch system as internal taxpayer (*binnenlandse belastingplichtige*) and not as external taxpayer (*buitenlands belastingplichtige*). Internal taxpayers pay a higher tax rate than external taxpayers.

A recent judgment of the District Court Breda (18 April 2011, LJN: BQ 3849) established that frontier workers living in Belgium and working in Netherlands can also deduct their mortgage. It bases its decision on the CJEU judgment in the *Gielen* case (C-440/08), in which the CJEU found the possibility to choose between different tax regimes of a country in breach with the freedom of establishment (Article 49 TFEU). The tax authorities have appealed the decision.

In 2010 a new journal was launched dealing with the (mainly social security and tax) problems of frontier workers: *Over de grens, vakblad over grensoverschrijdend werken*. See www.futd.nl

H. Verschueren (ed.), *Werken over de grens België-Nederland; Sociaal-en fiscaalrechtelijke grensconflicten*, Antwerpen: Intersentia 2011, ISBN 978-94-000-0219-7 (xiv + 246 blz.)

2. SPORTSMEN/SPORTSWOMEN

Field Hockey: There are now over 60 men with a foreign nationality playing in the highest hockey division. This development has been criticized by experts, as it is felt to affect the development possibilities of young Dutch players.

Basketball: For the season 2009/2010 and 2010/2011 a basket ball team in the highest division must include at least five Dutch players. For the season 2011/2012 a minimum of six Dutch players is foreseen: See: http://nbb.basketball.nl/content.php/nl/213?nbid=1825

Base-ball: For the 2010/2011 season base-ball teams in the highest league can consist of a maximum of 3 players without a Dutch passport. Before 2010 there were no restrictions for players with a passport issued by an EU Member State. A foreign player who has played for five years in the Dutch league is counted as a Dutch player**.**

3. THE MARITIME SECTOR

Nothing to report.

4. RESEARCHERS AND ARTISTS

The decisions of the Court of Justice in the *Gerritse* (2003), *Scoprio* (2006) and *Centro Equestre* (2007) cases and the amendment to the Commentary on Article 17 of the OECD Model Treaty have brought major changes to the rules on taxation that apply to artists and sportsmen. Now, expenses are deductible at source and normal tax returns should be possible at the end of the year. Many countries have changed their artist and sportsmen tax rules and rates, Germany being the most recent example with its drastic amendments per 2009. Some countries are still being pressurized by the European Commission, e.g. Belgium, Sweden and Spain. Only the Netherlands, Ireland and Denmark no longer levy taxes.

There is no withholding tax in the Netherlands on performance fees for artistes and sportsmen from countries with which the Netherlands have concluded a bilateral tax treaty. They have to pay taxes in their country of residence.

In April 2011, the Netherlands had concluded 93 bilateral tax treaties. The most recent were concluded with Hong Kong, Oman en Panama. For a list see: http://www.allarts.nl/nl-NL/nieuws/98/nederland-heeft-inmiddels-93-belastingverdragen.html.

5. ACCESS TO STUDY GRANTS

Since September 2007, the Dutch Study Finance Act (*Wet studiefinanciering, WSF*) allows students resident in the Netherlands to take their study grant with them when they study abroad. This is subject to the condition that the student must have resided legally in the Netherlands for at least three out of the six years preceding the beginning of the course abroad (Article 2.14 (2)(c) WSF). When applied to migrant workers, including frontier workers and their family members, this residence clause appears at odds with Article 7(2) Regulation (EEC) No. 1612/68. In particularly frontier workers who live in Belgium are affected by these rules. In December 2009, the European Commission started an infringe-

ment procedure against the Netherlands (case C-542/09). A decision of the CJEU is expected by the end of 2011.

Migrant workers and their family members residing in the Netherlands have access to study grants under the same conditions as Dutch citizens. A student from another Member State, who works an average of 32 hours a month, is treated as a migrant worker (Policy rule Minister of Education, 17 December 2009, *Staatscourant* 2010, No.124). Inactive EU citizens are subjected to a waiting period of five years that corresponds with Article 24(2) Directive 2004/38/EC and was acknowledged by the Court of Justice in the *Förster* (case C-158/07).

Judicial Practice

X v. Ministry for Education, Culture and Science, Rechtbank (Rb.) Groningen, 10 June 2010, No. 09/738 WSFBSF.

Applicant is a Belgian national, following a course of study in communication management at [X] in [X] (Belgium). Applicant received Dutch study finance from September 2007 onwards on the grounds that applicant's mother worked in Maastricht and had the status of Community (now: Union) worker. From the 1st of April 2009 onwards applicant's mother was, however, unemployed as a result of being made redundant. She currently receives Belgian unemployment benefits. As a result IB-Groep (now DUO/Minister for Education) decided that applicant no longer fulfilled the requirements necessary to be entitled to (export) study finance. The issue considered in this case evolves around the question whether the mother can continue to claim study finance for her child on the basis of Article 7(2) of Regulation (EEC) No. 1612/68 as a right being linked to her status as Union worker, even though she is no longer employed. The Rechtbank confirms that the migrant worker has a right to equal treatment as regards study finance as it is a social advantage within the meaning of Article 7(2) Regulation (EEC) No. 1612/68, and that this right of non-discrimination must be accorded to the children of the worker as well on the basis of the case law of the Court of Justice (cited are: Case C-3/90, *Bernini* and Case C-337/97, *Meeusen*). The Rechtbank then turns to the question whether this right to study finance continues to exist after the employment relationship has ended. Relying on *Fahmi* (case C-33/99), the Rechtbank holds that the loss of worker status entails the loss of an entitlement to study finance for the children of the worker, because the social advantage cannot be seen as inextricably linked to the (previous) employment relationship. In this context, furthermore, it is of no consequence whether the worker became unemployed voluntarily or involuntarily. Finally, the Rechtbank rejects the application of *Lair* (Case 38/86) to the case, as the facts were of a different nature. The case is now pending before the Central Appeal Tribunal.

6. YOUNG WORKERS

Nothing to report.

Chapter VII: Application of transitional measures

The vast majority of workers from the EU-12 employed in the Netherlands are nationals of Poland. Workers from Bulgaria and Rumania account for 10-15% of the workers from the EU-12.

In December 2009, a motion of the Socialist Party, asking the government to roll back free movement rights with the EU-12 and reintroduce migration controls, was voted down in the Second Chamber with only the Socialist Party and the PVV of Geert Wilders voting in favour (*Handelingen* Tweede Kamer 1 December 2009, p. 31-2889). During 2010 and 2011 politicians of other parties repeatedly raised the issue of reintroduction of immigration controls for EU-12 nationals, especially workers from Poland.

The coalition agreement of the current centre-right government, relying on the support of Geert Wilders's party (PVV), mentions a series of proposals to amend Directive 2004/38/EC, proposals that, if adopted, would apply to all EU nationals. The proposals are specified in a position paper of March 2011 and in a letter of the Minister of Social Affairs to the Second Chamber of April 2011. Some of the measures in that letter explicitly focus on EU-12 nationals; others are drafted in a general fashion, but primarily with Polish, Bulgarian and Rumanian nationals in mind. They include expulsion of EU workers employed in another Member State for more than one year, but less than five years if the worker has insufficient income, mandatory integration measures, to be paid by the EU citizens themselves, and sufficient knowledge of the Dutch language as a new condition for public social assistance along with the existing rules that oblige beneficiaries of social assistance to take courses in order to improve their employability (Tweede Kamer 29 407, No. 118).

In March 2011, the Second Chamber of the Dutch Parliament decided to start an inquiry in order to establish which lessons could be drawn from the recent labour migration from EU-12 Member States and which recommendation could be made for the future policies with regard to this issue (Tweede Kamer 32,680, Nos. 1-2.

7.1. Transitional Measures imposed on workers from Bulgaria and Romania

7.1.1 General information

The Netherlands continued to apply transitional measures after 1 January 2009. In reply to questions of MPs from several political parties, pleading for the extension of those measures after 2011, the government has repeatedly replied that a decision on that issue will be taken towards the end of 2011 (Tweede Kamer 29 407, Nos. 104 and 105). A study on migration from the EU-2 countries in order to prepare that decision has been commissioned.

On 1 January 2011 more than 25.000 Bulgarians and Rumanians were living in the Netherlands. Almost half of those EU-2 nationals had resided in the Netherlands between 1 and 5 years and 30% had resided in the Netherlands for more than 5 years (CBS Webmagazine). According to the population registration 4.241 migrants born in Rumania migrated to the Netherlands in 2010 (about the same number as in 2009: 4.300) and 2.565 left the Netherlands. In 2010, 2.697 immigrants born in Bulgaria were registered (up from 2.227 in 2009)

and 1.443 Bulgarian emigrants left the Netherlands. The net immigration in 2010 was 1.676 from Rumania and 1.254 from Bulgaria.

In 2010 a total of 1,570 temporary residence permits was issued to nationals of Bulgaria (clearly less than the almost 2,000 in 2009); 1,120 temporary residence permits were issued to Rumanian nationals, slightly more than in the previous year. Hardly any permanent residence permits were issued to EU-2 nationals in 2010.

The number of work permits issued to EU-2 nationals in 2010 was considerably lower than in the previous year: a total of 2,722 work permits was issued to Rumanian nationals (3,326 in 2009) and 867 work permits to Bulgarian nationals (down from 924). Most work permits were issued for seasonal jobs in horticulture and agriculture: 80% of the permits for Rumanian workers and 60% of the permits for Bulgarian workers; 10% of the applications for work permits for Rumanian nationals were issued for highly qualified jobs. Almost three quarters of the work permits are valid for 24 weeks or less; only 1% of the permits for Bulgarian workers and 4% of the work permits for Rumanian workers were valid for one year or longer. The latter are probably mainly the permits issued to highly qualified Rumanian nationals employed in research and IT jobs. In March 2011, in total 4.700 EU-2 nationals were registered as workers with the social security organisation UWV.

7.1.2 Texts in force

There was no amendment to the relevant legislation between January 2010 and August 2011. The Aliens Act 2000 (Article 17) and the Aliens Circular 2000, Chapter B10/1.2 both stipulate that EU-2 nationals are exempted from visa obligations. The Aliens Regulation provides that 'reliance on public assistance could result in loss of the residence right' should be included in the text on the residence permit issued to nationals from those two countries (Article 3.1(4) Aliens Regulation) and that employment is subject to a work permit (Article 3.2a Aliens Regulation). Article 8.26, under j, of Aliens Decree provides that the Minister of Justice adopts rules implementing the Association Agreements with Bulgaria and Romania. From the explanatory memorandum it appears that the amendment intends to indicate that the transitional measures are still in force for the EU-2. However, the reference is not correct. The clause in Article 8.26 of the Aliens Decree should refer to the Accession Treaties with the two Member States and not to the two, now defunct, Association Agreements.

The rights and obligations of workers from Bulgaria and Romania under the transitional rules are explained in detail in the Aliens Circular 2000, Chapter B10/8.

Points 37 and 38 of the Annex to the Ministerial Decision Implementing the Aliens Employment Act (*Wet arbeid vreemdelingen*) stipulate that workers from Bulgaria and Rumania are exempted from the work permit requirement after they have lawfully worked for 12 months in the Netherlands. For non-exempted EU-2 workers a work permit is required. Such permits are issued following a labour market test.

7.1.3 More restrictive application and future amendments of work permit legislation in 2011

In April 2011 the Minister of Social Affairs announced his intention to restrict the granting of work permits for seasonal jobs after 1 July 2011 to the absolute minimum. In reply to questions in parliament, the Minister stated that the current rules, obliging employers to look for alternative solutions, for instance the employment of Polish workers through private employment agencies, would be applied more strictly (Tweede Kamer 29 407, No. 119 and 126). On 28 April 2011, after an extensive debate in the Second Chamber on the government's intention to make the practice of issuing work permits more restrictive, a motion ask-

ing the government to abstain from its intention to make the practice of issuing work permits for workers from Bulgaria and Rumania more restrictive, considering the prospect of free movement with the EU-2 in January 2014, was rejected by the Second Chamber with an overwhelming majority (Tweede Kamer 29 407, No. 127 and *Handelingen,* p. 80-5-127). During the debate the Minister stated that in the years 2008-2010 approximately 3.000 work permits had been issued each year to workers from Bulgaria and Rumania and that he wanted to avoid a repetition of that practice in 2011 (Tweede Kamer 29 407, No. 127, p. 18). The new rules (*toetsingskader*) to be applied when deciding on an application for work permits after 1 July 2011 were published in a letter of the Minister of Social Affairs of 8 July 2011 (Tweede Kamer 29 407, No. 128). Employer organisations voiced strong opposition against the introduction of the more restrictive rules and several employers filed appeals against the refusal to issue work permits for Rumanian or Bulgarian workers. A first request for an interim injunction was denied. However, in four cases the District Court of The Hague issued an interim injunction allowing the employer to employ the EU-2 workers pending the administrative review of the refusal in July 2011 (see par. 7.1.5 below).

As the large majority of work permits issued for EU-2 workers in 2007-2010 were issued for seasonal jobs, the new rules are, in fact, a major change of the Dutch policy on admission of EU-2 workers. The number of work permits issued for employment of EU-2 workers in the horticulture during the first four months of 2011 was already clearly lower than in 2010: 51 for Bulgarian workers (491 for the whole of 2010) and 456 for Romanian workers (2175 in 2010). The number of applications in 2011 dropped.

In a letter of 11 April 2011 to the Parliament, the Minister of Social Affairs announced the introduction of new restrictions in the work permit legislation without mentioning the standstill-clauses in the Accession Treaties with Bulgaria and Rumania (Tweede Kamer 32 144, No. 5). Rumania was number one and Bulgaria number four on the list of countries whose nationals have been granted a work permit in 2010. The Second Chamber, in a motion adopted in December 2010, had asked for the introduction of further restrictions in this legislation (Tweede Kamer 32500 XV, No. 37).

7.1.4 Illegal employment and disputed self-employment

The Labour Inspectorate detected a total of 564 underpaid workers in 2010, 20% were Dutch nationals, 41% Polish nationals, 3% (19) Bulgarian nationals and 2% (13) Rumanian nationals (Annual Report 2010, p. 44).

In 2010 the inspectorate detected 600 Bulgarian workers employed without the required work permit and 141 Rumanian workers without a work permit, accounting for 25% and 6% of the total number of detected undocumented workers (Annual Report 2010, p. 45).

The Labour Inspectorate often deems that EU-2 nationals who claim to work as self-employed persons or service providers are, in fact, workers. In 2009 the Inspectorate found in 426 cases and in 2010 in 255 cases that the 'pseudo-self-employment' was a cover for employment. In both years 85% of those cases concerned Bulgarian nationals (see footnote 8 of the annex to a letter of the Minister of Social Affairs of 1 August 2011). In those cases heavy administrative fines are imposed on the individuals or companies that qualify as the employers of those workers. As in previous years, many of the cases concerning Bulgarian nationals dealt with by the Dutch courts concern persons who deny the qualification of employer or dispute the level of the administrative fine that they consider unreasonably high (see par. 7.1.5 below).

7.1.5 Judicial practice

* It is evident that the criteria for deciding applications for a work permit have been amended and this could possibly be a violation of the standstill clause in the Annex to Article 14 of the Accession Treaty with Bulgaria and with Rumania. This question cannot properly be decided in a procedure for an interim injunction. It has not been made clear what other activities the employer should have performed in order to prove that there is no alternative way of fulfilling his vacancies for seasonal work in the horticulture. The list of private employment agencies provided by the government is no evidence that there are sufficient workers available and some of those agencies demand high fees. The employer should be treated as having the required work permit pending the administrative review of the refusal. District Court The Hague 27 July 2011, AWB 11/20541, LJN: BR2785. Similar judgments were pronounced by the same court on the same day: see www.rechtspraak.nl, LJN: BR2788, BR2778 and BR2786.

* The Minister of Social Affairs imposed an administrative fine of 8,000 Euros on a German firm selling food from a mobile van across the border in the Netherlands assisted by a Rumanian national. Considering that these activities are to be qualified as cross border service provision within the meaning of Article 49(1) EC Treaty no work permit is required for these activities. The fine was improperly imposed. Appeal allowed. Judicial Division of the State Council 24 November 2010, 201003538/1, LJN: BO4884, *Jurisprudentie Vreemdelingenrecht* 2011/147.

* The Minister of Social Affairs imposed an administrative fine of 24,000 Euros on the owner of a fairground attraction who was assisted by three aliens when setting up the attraction. One of the three aliens was a Rumanian national who claimed to have only assisted the owner as his friend. Both the owner and his Rumanian friend declared to the labour inspector that the friend was not paid for his assistance. Considering the case law of the Court of Justice, especially the *Mattern and Cikotic* judgment, an essential element of employment was absent and the fine was improperly imposed with regard to this person. Hence the fine was reduced to 16,000 Euros. Judicial Division of the State Council 1 December 2010, 201005453/1, LJN: Bo5745, *Jurisprudentie Vreemdelingenrecht* 2011/173.

7.1.6 Literature

E. Baraya and J. Starrenburg, *Monitor Midden- en Oost-Europeanen in Den Haag* (Gemeente Den Haag, 2010)

A. Corpeleijn and M. Heerschop, Groei Oost-Europese werknemers trekt weer aan, *CBS Webmagazin,* 12 July 2010

J. van Rooijen and E. Eenkhoorn, Meer werknemers uit Midden- en Oost-Europa, *CBS Webmagazine,* 4 July 2011

E. Wobma and R. van der Vliet, Aantal Midden- en Oost-Europeanen in vijf jaar tijd verdubbeld, *CBS Webmagazine,* 25 July 2011

Chapter VIII: Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION (EEC) NO. 1408/71 AND REGULATION (EEC) NO. 883/04, ON THE ONE HAND, AND ARTICLE 45 TFEU AND REGULATION (EEC) NO. 1612/68, ON THE OTHER HAND

In the Netherlands the only problems concern the WAJONG-benefit which was subject of the Court of Justice's judgment in the *Hendrix* case.

Judicial practice
On 14 October 2010 the CJ EU answered the preliminary questions put to it by the Central Appeal Tribunal regarding the compulsory contributions as set out in the Dutch Health Care Act to be made by Dutch citizens living abroad in case C-345/09 (*Van Delft*):

> 1. Articles 28, 28a and 33 of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, in conjunction with Article 29 of Council Regulation (EEC) No. 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Commission Regulation (EC) No. 311/2007 of 19 March 2007, must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which recipients of pensions payable under the legislation of that State who reside in another Member State in which they are entitled under Articles 28 and 28a of Regulation No. 1408/71 to the sickness benefits in kind provided by the competent institution of the latter Member State must pay, in the form of a deduction from their pension, a contribution in respect of those benefits even if they are not registered with the competent institution of their Member State of residence.
> 2. Article 21 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which recipients of pensions payable under the legislation of that State who reside in another Member State in which they are entitled under Articles 28 and 28a of Regulation No 1408/71, as amended by Regulation No 1992/2006, to the sickness benefits in kind provided by the competent institution of the latter Member State must pay, in the form of a deduction from their pension, a contribution in respect of those benefits even if they are not registered with the competent institution of their Member State of residence. On the other hand, Article 21 TFEU must be interpreted as precluding such national legislation in so far as it induces or provides for — this being for the national court to ascertain — an unjustified difference of treatment between residents and non- residents as regards ensuring the continuity of the overall protection against the risk of sickness enjoyed by them under insurance contracts concluded before the entry into force of that legislation.

A case note on this judgment was written by Marjan Ydema-Gutjahr, published in: *Rechtspraak Vreemdelingenrecht* 2010, No. 88 and by W. Sauter, Sociale zekerheid, vrij verkeer en Unieburgerschap: de rafelranden van het nieuwe zorgstelsel?, *Nederlands Tijdschrift voor Europees Recht* (2011) p. 62-70.

A reference to this judgment has already been made by the District Court Amsterdam, obliging Dutch citizens living abroad to pay the compulsory contributions as required by the Dutch Health Care Act (Rechtbank Amsterdam, 23 December 2010, BP 6229).

2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38/EC AND REGULATION (EEC) NO. 1612/68 FOR FRONTIER WORKERS

According to the government there is no tension between Regulation (EEC) No. 1408/71 and Directive 2004/38/EC regarding access to social assistance benefits (Tweede Kamer 21501-31, No. 182).

There is no information on tension between Directive 2004/38/EC and Regulation (EEC) No. 1612/68.

3. EXISTING POLICIES, LEGISLATION AND PRACTICES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON FREE MOVEMENT OF EU WORKERS

3.1 Integration measures

As set out in previous national reports, nationals from the EU Member States are exempted from integration obligations as this would contravene European rules. However, initiatives to explore the possibilities to advance the integration of EU workers are being developed as set out in the *Regeer- en Gedoogakkoord* (Tweede Kamer 2010-2011, 29 407, No. 118, *Brief van de Minister van Sociale Zaken en Werkgelegenheid* [Letter of the Minister for Social Affairs and Labour], 14 April 2011, p. 19-20). A proposal to amend the *Wet werk en bijstand* [Law on Labour and Social Benefits] that will make the right to a benefit subject to sufficient Dutch language skills is pending (Tweede Kamer 32 328).

Though not compulsory, measures adopted by the Rotterdam and The Hague council's have resulted in an increasing number of CEE-nationals participating in tailor made integration activities. In 2010, 500 CEE-nationals participated on a voluntary basis in Rotterdam. The number for The Hague is 1200. For the Netherlands a total of approximately 9000 CEE nationals have participated in an integration activity offered at a local level on a voluntary basis; an increase in numbers compared with earlier years. The budget allotted to local councils for integration measures is being used to enable voluntary integration, where it suffices. To stimulate online learning at an elementary level by CEE-nationals, online course material is being made more accessible to this group by providing guidance in CEE-languages. Finally, employers are being encouraged to facilitate and improve the language skills of their CEE-workers by offering those workers time, facilities and guidance with their integration. Such activities can be financed from existing Education and Development funds. For the cleaning industry arrangements have found there way into the 2010-2011 CAO [Collective Employment Agreement]. There are plans to include similar arrangements in other CAOs (Tweede Kamer 2010-2011, 29 407, No. 118, *Brief van de Minister van Sociale Zaken en Werkgelegenheid* [Letter of the Minister for Social Affairs and Labour], 14 April 2011, p. 19-21).

The financing of integration measures post-2013, when the current system for financing integration activities expires, is under consideration. Loans are one of the possible options.

Publications

C.A. Groenendijk, Turkse burgers en EU burgers: niet inburgeringsplichtig, maar wel recht op inburgeren, 1 *Asiel & Migrantenrecht* (2010-7) p. 368-369

Monitor Midden- en Oost-Europeanen in Den Haag, 2010, Onderzoek en Integratievraagstukken (Gemeente Den Haag, 2010) retrieved from: http://zbs.denhaag.nl/risdoc/2010/RIS176004A.PDF; http://www.rotterdam.nl/tekst:polen_worden_steeds_rotterdamser

3.2 Immigration policies for third-country nationals and the Union preference principle

The discussions to amend Dutch law on marriages, as reported in the 2009-2010 Dutch report, are still ongoing (Tweede Kamer 2009-2010, 32 175, No. 1, *Huwelijks- en gezinsmigratie (Marriage and family migration)*). On 5 November 2010 the State Commission for International Private Law advised the Minister for Security and Justice on the compatibility of the envisaged amendments with international law. No explicit consideration is, however, given to the compatibility of the envisaged amendments with European law, though in its final conclusions the State Commission does observe that though not recognising a polygamous marriage convened outside the Netherlands could violate Article 8 ECHR, this is not the case as far as other treaties are concerned. Unfortunately there is no reference establishing which treaties. As the State Commission does not consider European free movement law at all, it cannot be assumed that the State Commission is passing judgment on the compatibility of the envisaged measures with European law (*Advies Staatscommissie voor het Internationaal Privaatrecht*, *Bijlage bij Kamerstuk* 32 175 nr. 17, p. 14).

On 24 April 2011, the Minister for Immigration and Asylum, the Home Secretary and the Secretary of State for Security and Justice informed the Second Chamber of their plans regarding impediments to marriage, polygamous marriages and age limits and the recognition of such marriages convened abroad, as presented in 2009 and taking into account the findings of the State Commission for International Private Law (Tweede Kamer 2010-2011, 32 175, nr. 17, *Brief van de staatssecretaris van veiligheid en justitie en van de ministers voor immigratie en asiel en van binnenlandse zaken en koninkrijksrelaties*, 24 April 2011).

- The definition of a forced marriage will include a marriage that has been convened lawfully, but where one or both of the partners was/were not able to express there intention to be married and would rather not have been married. To combat forced marriages the public prosecutor's competences will be extended allowing him/her to prevent a forced marriage, on the one hand, and request for annulment of a marriage that has been concluded under threat where this is not done by the spouse for personal reasons, on the other hand.
- Polygamous marriages convened abroad will not be recognized when one of the partners is habitually resident in the Netherlands, has applied for a residence permit for the Netherlands, is a national of the Netherlands or a national of a State that does not recognize polygamous marriages. Where the family relationship between a child born out of a polygamous marriage and the parent is included in an official Birth Certificate its relationship with the parents will be recognized unless this is clearly incompatible with public order (Article 9 and 10 of the *Wet Conflictenrecht Afstamming* [Law on Birthright Conflicts]).
- Though the proposed impediment to third and forth degree (sideline) marriages will be a 'step back in time', the Ministers and Secretary of State find no problem in reintroducing it in the light of the strong suspicions that marriages between these relations more frequently emanate from force. If the marriage is to be convened in the Netherlands dispen-

sation will be given after establishing that marriage will be entered into freely by both partners. As information on third and forth degree (sideline) relationships is not readily available, couples will be requested to sign a written statement regarding their relationship prior to their marriage. Where it transpires that this statement does not convey the true relationship, the marriage will be null and void. If concluded abroad, a marriage between third and fourth degree (sideline) relations will be recognized, but subject to those measures which can be adopted against forced marriages where appropriate.

- Marriage will not be open to anybody younger than eighteen years of age. To this end the current exceptions (pregnancy, motherhood and non-nationals married under the law of their State of nationality) will be removed from Article 1:31(1) of the Civil Code. Marriages convened abroad at a time when one or both of the spouses were under eighteen will, however, be recognized once the spouses are both eighteen years of age.

3.3 Return of nationals to new EU Member States

An increasing number of CEE-nationals claiming social assistance, using the facilities for day and night care, causing inconvenience and participating in criminal activities in the four largest towns (Amsterdam, Rotterdam, The Hague and Utrecht) has resulted in general measures that enable the authorities to revoke an EU-citizen's residence right when an application for social assistance is made. Social assistance is understood as including financial assistance and social care (Tweede Kamer 2010-2011, 29 407, No. 118, *Brief van de Minister van Sociale Zaken en Werkgelegenheid* [Letter of the Minister for Social Affairs and Labour], 14 April 2011, p. 22). Effectively this means that strict compliance with the conditions in Directive 2004/38/EC will be monitored; residence in excess of three months will be subject to the possession of sufficient financial means not to become a burden on the Dutch financial system. A pilot has been started to terminate the right of residence of EU-citizens whose reliance on day and night care is classed as 'unreasonable'. To prevent this group from 'disappearing', the measures which can be adopted to keep track of those whose right of residence has been terminated following unreasonable use of day and night care, e.g. an obligation to report to the local authorities, are being considered (Tweede Kamer 2010-2011, 29 407, No. 118, p. 24).

A right of residence as a work seeker will only be acknowledged if there is proof that the work seeker is awaiting the result of a job application procedure or can prove in any other way that an employment contract is forthcoming. Lawful residence is no longer assumed if these conditions are not satisfied and financial means are insufficient. This, in turn, triggers an obligation to leave the Netherlands. There will still be a right to remain in the Netherlands if unemployment follows the pursuit of an economical activity as an employed or self-employed person. The pursuit of an economical activity for less than a year entitles an EU-citizen to remain for another six months following unemployment. In all other cases there is currently an indefinite right to remain, irrespective of the financial means available. The government envisages an amendment of Directive 2004/38/EC that will allow a Member State to terminate a right of residence and a corresponding right to social benefits where residence for the purpose of pursuing an economical activity was shorter than five years. Along the same lines, consideration is given to the options to tighten European rules, subject to respect for the right to family life in Article 8 ECHR, when an economically inactive person applies for social assistance.

Voluntary return activities for vulnerable persons (i.a. those in need of psychological or medical care) are underway in Utrecht (project with Polish sister city) and The Hague (voluntary return of 14 homeless CEE-nationals). Though facilitation of voluntary return is preferred - voluntary return is considered to contribute towards successful return - EU-citizens are forced to return where there personal conduct is found to satisfy the definition of public policy in Article 27(2) Directive 2004/38/EC. Forced return is only effectuated if voluntary departure has not occurred within 28 days. Since February 2011, repeated offenders of crimes that, as such, do not justify an entry ban (*ongewenstverklaring*), are being expelled and are finding themselves subject of an entry ban (*ongewenstverklaard*) (Tweede Kamer 2010-2011, 29 407, No. 118, p. 24).

5. NATIONAL ORGANIZATIONS OR NON-JUDICIAL BODIES TO WHICH COMPLAINTS FOR VIOLATION OF COMMUNITY LAW CAN BE LAUNCHED

Equal Treatment Commission and National Ombudsman. Decisions of both organizations are not legally binding.

6. SEMINARS, REPORTS AND ARTICLES

On 25-26 November 2010, the Centre for Migration Law of Radboud University Nijmegen organized the Network's annual conference in London. The presentations have been published on the website of the CMR: www.ru.nl/law/cmr/free-movement/annual-conference/.

All relevant reports and articles are mentioned in the other chapters of this report.